COMMERCIAL DISPUTES THERE IS A BETTER WAY!

Mediation is growing in importance as a means of resolving commercial disputes and Chartered Accountants Ireland has recently established a Mediators Forum. Mediation can save both time and money, as **Colm Deignan** explains.

One of the many consequences of the current economic downturn has been significant growth in the number of commercial disputes. Such disputes, as well as depleting the financial resources of companies and their principals, are incredibly stressful. They can potentially affect the ongoing operation, and indeed viability, of a business as time and energies that should be utilised in addressing the immediate problems of the company are sidetracked into dealing with conflict.

At a time when finance and credit are in short supply it seems ironic that scarce resources would be further depleted through an acrimonious dispute. Such disputes can involve banks and borrowers; manufacturers and clients; suppliers and customers and even within companies and organisations, between business partners, employees, management executives and shareholders.

Often the only real winners in resolving such disputes are the members of the legal profession.

> "THE STARTING POINT MUST SURELY BE THE FACT THAT THE MEDIATION PROCESS ITSELF CAN AND OFTEN DOES BRING ABOUT A MORE SENSIBLE AND MORE CONCILIATORY ATTITUDE ON THE PART OF THE PARTIES THAN MIGHT OTHERWISE BE EXPECTED TO PREVAIL BEFORE THE MEDIATION AND MAY PRODUCE A RECOGNITION OF THE STRENGTHS AND WEAKNESSES OF EACH PARTY AND A WILLINGNESS TO ACCEPT THE GIVE AND TAKE ESSENTIAL TO A SUCCESSFUL MEDIATION."
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> HON MR JUSTICE LIGHTMAN

Mediation Case Study

A distribution company based in Dublin, Gofast Limited, had grown and developed into a successful company with annual turnover of €10m and profit after tax of €600,000.

The shareholders were Bill Butler (60%) and Colin Courtney (40%). Bill and Colin established the company in 2002 and whilst initially they were both involved in developing the business, Colin had left the day to day management of the company to Bill in order to manage his family's property development business.

Colin had remained on the board of directors but only occasionally attended meetings. He did not receive a salary but was paid €5,000 per annum in directors' fees.

Colin found himself in serious financial difficulty arising from the collapse of his property empire and sought to realise value for his shareholding in Gofast Limited.

There was no shareholders' agreement in place and, according to the articles of association, the shares could only be sold to a willing buyer after first being offered to the existing shareholders at the same price.

Colin was unable to find a willing buyer prepared to acquire a minority share in this private company. He was advised that the only legal solution for him was to apply to the courts to rule on his oppression as a minority shareholder.

Relations with Bill deteriorated following the issue of plenary summonses which contained serious allegations by both parties. The case was eventually listed for hearing in the Commercial Court.

Bill's barrister was advised that the judge would insist on the parties going to mediation and he suggested to his counterpart that the matter be referred to an independent mediator. They agreed to this and after some discussion both agreed on the selection of the mediator.

The mediation was attended by the parties and their legal and financial advisors.

At the Mediation it was clearly pointed out that the grounds for oppression were to be contested. It was also made clear that Bill had created the value in the company and Colin had not contributed to any significant extent and that Colin's shares were only worth what Bill was prepared to pay. Colin argued that he had provided the initial customer base and greater initial capital and only for him the business would never had got off the ground.

The mediator listened to the arguments on both sides and then suggested that both parties withdraw to separate breakout rooms and that the financial advisors might meet to address the issue of valuation. Using standard valuation guidelines the financial advisors agreed the 40% shareholding had a value range of between €1.0m and €1.5m. The parties considered these values and after considerable discussion between the parties and the mediator a final agreement was reached at a value of €1.35m to be paid in three annual payments of €450k which were secured by a second charge on the company's property.

The whole mediation process including pre-mediation briefings had taken less than three days and had cost the parties just €7,600 excluding their professional advisors' time. This was a very significant saving on the potential costs involved in a Commercial Court hearing. All parties agreed that the mediation process had been most helpful as it was solution based and allowed the parties engage in the process.

The fact that the mediator was an accountant was also a great advantage in agreeing the valuation.

> "THE COST OF LITIGATION IS A DETERRENT TO ANY BUT THE RICH, THE COURAGEOUS AND THE FOOLHARDY. COURT CASES, WHERE ONE SIDE WINS AND THE OTHER LOSES, IS THE NUCLEAR OPTION. IT SEEMS TO ME THAT THIS OWNERSHIP OF BOTH THE PROBLEM AND THE SOLUTION IS ONE OF THE GREAT ATTRACTIONS OF MEDIATION"
> MR JUSTICE PEART

One far less confrontational approach that could go a long way towards resolving many disputes – and safeguarding much needed resources within businesses – is the growing practice of commercial mediation. Mediation is a facilitative and confidential process in which a mediator assists parties to a dispute as they attempt, on a voluntary basis, to reach a mutually acceptable agreement. The benefits of this approach are now being recognised at Government level and a new Bill giving a statutory basis to commercial mediation is due to be signed into law in 2013.

The Mediation Bill will make it obligatory for solicitors and barristers to advise a client to consider using mediation as an alternative in dispute resolution. Already the practice of mediation as a means of settling disputes is growing in this country as the Courts regularly insist on parties attending mediation before a case is heard.

Historically commercial dispute resolution in Ireland was limited to arbitration or legal action. These approaches are similar as both are adversarial based requiring:

- pleadings – where the parties accuse one another;
- discovery – where the parties produce copies of all emails, texts, phone messages, letters, correspondence, contractual terms and notes to the other side;
- witnesses who are cross examined by barristers.

The only real difference is that the arbitration process is held in private and the arbitrator charges a fee.

Resolving disputes can be an expensive and long drawn out process. Invariably much "dirty linen" gets washed in public and the whole process is fuelled by intemperate language as the adversaries draw lines in the sand. Had the parties been aware of the likely eventual costs in advance of initiating the process, many would have reconsidered their approach to the dispute.

ADVANTAGES OF MEDIATION

Imagine if a shareholder dispute, contract dispute, payment dispute, termination dispute or other commercial dispute could be resolved by calling the parties together and figuring out a way to resolve the matter in a civil manner. Imagine if the solution was one the parties designed and agreed to. Imagine the time saving, cost saving and stress reduction that would result.

The successful mediation of a commercial dispute will lead to such savings and facilitate continued working relations where appropriate. If used in a proper and timely fashion, the mediation process has a high success rate.

The mediator should become involved in the dispute as early as possible and certainly as soon as the parties and lawyers have a very good handle on all of the factual and legal issues. Preferably the mediation should take place before expensive discovery. However, mediation is always an option even if court proceedings have commenced. As a simple rule of thumb, the earlier the parties in a dispute agree to mediation, the greater the savings.

Often disputes are fuelled by emotion rather than the desire for settlement. Settlement on terms that the parties themselves help achieve is the closest most parties will come to real justice.

The mere desire to settle a dispute is not enough. A successful mediation requires commitment. If all parties and counsel commit to resolving the dispute, there will be a settlement. When all the ingredients are present, it works exceptionally well.

In mediation the parties remain in control of what is a non-adversarial, speedy and confidential procedure. Mediation is an interest-driven process based on consensus and collaborative agreement. It helps the parties to explore the issues which are of real importance to them. The parties are encouraged to find ways to address their present and future needs, rather than dwell upon who may have been right or wrong in the past.

The mediator does not impose a decision, nor make any kind of judgment – unlike court or arbitration. The mediator's role is to help the parties to find their own, mutually acceptable solution.

Mediation offers a win-win situation. The process is confidential and "without prejudice" so that should a settlement not be reached litigation may continue without the parties needing to worry about having given away anything that the other could use against them in court. This is set out in a mediation agreement signed by all parties at the outset which also stipulates that the mediator cannot appear as a witness for either party in the event of any future court proceedings.

Even on the rare occasions when mediation fails to result in a comprehensive solution, the process invariably provides insights – even partial agreements – which may encourage and support continued negotiation after the mediation.

Ultimately the success of the mediation process lies in the fact that the parties to a dispute remain in control of the outcome and of any potential resolutions. In this way mediation works towards long-term solutions for the parties in dispute and where there is an ongoing relationship places significant emphasis on how they will interact in the future. ■

Colm Deignan, FCA is an Accredited Mediator and member of the Mediators Forum, Chartered Accountants Ireland (www. caimediators.com). Contact Colm at www.mediatorcommercial.com

IN BRIEF

INTEGRATED CORPORATE REPORTING

The International Accounting Standards Board (IASB) and International Integrated Reporting Council (IIRC) have announced an agreement that will see the two organisations deepen their cooperation on the IIRC's work to develop an integrated corporate reporting framework.

The Memorandum of Understanding, signed by IASB Board Chairman Hans Hoogervorst and IIRC Chief Executive Paul Druckman demonstrates the common interest of both organisations in improving the quality and consistency of global corporate reporting to deliver value to investors and the wider economy.

LOAN-LOSS PROVISIONING

The International Accounting Standards Board (IASB) has published revised proposals for the impairment of financial instruments. The proposals contained in Exposure Draft *Financial Instruments: Expected Credit Losses* build upon previous work to develop a more forward-looking provisioning model that recognises expected credit losses on a more timely basis. The comment period closes on 5 July 2013.

DEVELOPING COMPETENCE: PRACTICAL EXPERIENCE GUIDELINES

The International Accounting Education Standards Board (IAESB) has issued a revision of International Education Standard (IES) 5, *Initial Professional Development – Practical Experience*. The revised IES 5, which is effective from 1 July 2015, recognises that practical experience is relevant in developing the competence of an aspiring professional accountant.

IES 5 is available for download from the publications area on www.ifac.org.