

Mediations in the time of Covid-19

In our factsheet *Renegotiation – An art not a science*, we touched upon resolving disputes using the process of mediation.

Mediation is:

- Voluntary, private and non-binding negotiation until the parties distil any negotiation/ settlement to a new written settlement agreement.
- It is most often the appointment of a qualified professional third party mediator (from a professional mediation body such as CEDR or Independent Mediators in the UK) who shuttles between the parties, undertaking confidential discussions with the parties, with a view to brokering a negotiation/ settlement between them.

In the past, mediation has usually been undertaken across, at least, three rooms at a neutral venue with the mediator shuttling between the opposing parties' rooms having confidential discussions with each party to try to narrow the dispute and gap between them, and ultimately try to get them to reach a settlement.

At the start of such a mediation, there was usually a plenary session where the mediator sits at one end of the table and the parties and their lawyers speak to each other across it.

With Covid-19, mediation has now moved online and they are taking place by various platforms using live screen video. In particular, Zoom is being used as the facility for secure separate breakout rooms for separate parties and for bringing the parties together in a plenary session.

So how is it operating virtually? The mediator places each party and its lawyers into its own virtual room, even if representatives from party are at different locations. The mediator can then speak to each party separately or with the parties together. Instead of actual shuttle diplomacy between actual rooms, the mediator does the same virtually by switching online from room to room.

But what are the matters and potential pitfalls that need to be considered for a virtual mediation:

Check that there is an online mediation protocol in the mediation agreement to be signed by the parties which governs the terms of how the virtual mediation progresses and the rules to be adhered to. It should contain at least the following:

- The parties should agree that no recording of the mediation takes place (it's a confidential process), no photo images are taken and that there is no sharing of the mediation meeting ID other than to participants at it.
- If for any technical reason, including error on the mediator's part in moving parties correctly to the breakout rooms, a participant finds itself able to see and/or hear a private conversation between the mediator and/or any other party, the participant should terminate the online mediation session at once and call or text the mediator on the number provided by it.
- Steps to be taken if technology fails to operate properly or the mediation session does not start on time or is interrupted.

In the case of the cross border mediations, pre-mediation checks should be undertaken to ensure that no national firewalls prevent parties in one jurisdiction from using Zoom or the technology platform to be used for the mediation.

A pre-mediation call from the mediator to all participants from a party and the testing of the technology platform to be used by all representatives of party for the mediation is paramount. A good and secure internet connection and both the parties and the mediator understanding the technology/platform are very important to a successful mediation.

As to the virtual mediation itself, the following points should be borne in mind:

- A headset with microphone or earphones with microphone is very helpful.
- Mute microphones and don't talk over people.
- A professional background and decent lighting will assist the process. Representatives of a party should show their faces and not hid behind their name on a black screen or stock photo of themselves so that each party and the mediator can see how they are reacting to points being made.
- An interruption free day is very important for participants. That is more easily achieved in an in-person mediation rather than representatives from a party being in different locations and often at their homes. The use of phones and checking emails on the computer that a party is using to participate in the virtual mediation should try to be avoided.
- Across a screen, it is going to be more difficult to establish rapport. To gain a parties' trust and confidence, rapport must be genuine. Before people are willing to settle, they must feel that their interests are truly understood. Only then can a mediator reframe problems and float creative solutions. Relationship building is more difficult online. Eye contact with the other side can be difficult if they are sitting well back from their screens and not in the same room.

Virtual mediation is still relatively new for all clients, litigators and mediators. In our experience of having undertaken virtual or live screen mediations, it's the best bet in circumstances where parties genuinely cannot all be present at the same premises (even on a socially distanced basis), but it is simply not as effective as a live mediation with all the parties at the same venue, cooped up in their respect rooms for most of a day and with the mediator being able to shuttle between them in the flesh.

Perhaps one of the most well recognised users of online dispute resolution is Ebay. It is estimated that an incredible +50 million disagreements amongst traders on eBay, are resolved every year using online dispute resolution.

Virtual mediation is here to stay and is no doubt appropriate for low value disputes but where considerable sums are in dispute, serious consideration should be given to the traditional form of mediation even in the current circumstances.

HOW CAN CONEXUS LAW HELP?

Businesses and individuals will need legal advice to help them understand the risks they may face and the options that may be open to them.

We are available to assist in reviewing the laws in many jurisdictions across the world, and to review specific contracts. We are also available to provide practical, business-orientated advice on how to best protect yourself from the ongoing commercial effects of Covid-19.

Contact

For further advice on renegotiating your contractual obligations or pursuing your contractual rights, please contact **Ian Timlin**.

Ian has been a CEDR (The Centre for Effective Dispute Resolution) accredited mediator since 2000.

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