



what should I use mediation for?

Geoff Sharp, a barrister specialising in commercial mediation, zeros in on when to call a mediator and the benefits. As a member of LEADR Advanced Panel of Mediators and the AMINZ Mediation Panel, Geoff is the only New Zealander to be invited to join the International Academy of Mediators, a US/UK based group of 120 business mediators.

It used to be easy – you disagreed, you went to court – and, if you were lucky, you even got to say ‘make my day - sue me’ as you left the room. Well not anymore!

In this complex world of ours, counsel are asked to pick a process in the ‘multi-door courthouse’. You can choose the one with the gold plate that says ‘litigation, this way’ or any number of others that point to arbitration, early neutral evaluation, mini trial, mediation etc.

As with many things, life in New Zealand is a little simpler than elsewhere and in reality we utilise only litigation, arbitration and mediation when resolving business disputes. Of these, we have seen a dramatic growth in mediation and most in-house counsel will have some experience of the process either directly or through instructing outside lawyers.

So how do we know when mediation is the appropriate vehicle for resolving a particular business problem? What are the signposts on the winding resolution road that point to the mediation option?

It is generally accepted that commercial contracts should include a multi-step dispute resolution clause with three sequential stages of dispute resolution:

1. A negotiation phase between executives with decision-making authority who are sometimes required to be at a higher level than staff involved in the dispute;
2. A mediation phase to facilitate agreement by employing a neutral mediator to assist the parties reach agreement;
3. Then one of:
 - a final binding arbitration phase in case the non-binding phase produces no settlement; or
 - litigation if the non-binding phase produces no settlement and private binding arbitration is not selected.

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talk to any organisation that has been through complex litigation that has eventually been removed from the court to the mediation room. These organisations identify at least three important benefits:

1. Certainty (where, for the prior life of the dispute, nothing had been predictable), and speed
2. A relationship with the other side
3. Privacy

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Most will speak about their strong desire to reach a finality of the process, especially after they have been locked into litigation for some time.

The fact that mediation allows the organisation to once again control the dispute after the runaway litigation train has been stopped is, in some cases, an extremely important factor. An opportunity to speak to the other side with a view to persuading them that the matter should be settled on an acceptable basis can be an extremely safe and attractive proposition a month out from trial.

Most organisations will find themselves in litigation with people they have done business with in the past and with whom they will do

business again in future. In a multi-faceted business dispute, there will be a relationship in there somewhere worth saving.

Where the argument is simply over money and there is no future of interaction between the parties, direct negotiation should settle the dispute. It is an expensive exercise to hire a mediator as a high-priced bellhop to go between the parties trying to get one up and the other down on the money. However when the dispute is not settling because of the dynamics between the negotiators, some unseen blockage or the need to obtain a reasonable settlement, yet there is a desire to keep the relationship alive for future profit, it's time to call in a mediator.

In the end, most experienced counsel can find their way through to a deal on the dollars but often get tripped up with barriers involving the

chemistry and architecture of the negotiation. In these cases counsel will mediate the problem leaving the mediator to mediate the people. **CL**

You can find LEADR's Sample Mediation Contract Clause at www.leadrnz.co.nz and for more information on the in's and out's of mediation see www.geoffsharp.co.nz