INCORPORATING MEDIATION INTO A COMPANY'S DISPUTE RESOLUTION PROGRAM

By John Lowe

Mediation is being discussed and used to a greater extent than ever before by companies as a tool for resolving or, at a minimum, attempting to resolve, actual or incipient disputes. For the corporate lawyer, responsible for managing disputes in a corporate environment several steps need to be taken before mediation is incorporated, in any meaningful sense, into a company's dispute resolution process.

That being said mediation can always be attempted on an occasional or one-off basis but even if this is done certain basic groundwork needs to be laid. For a company that has not been involved in a mediation corporate counsel needs to inform the company management as well as all those who may be involved in the mediation process. The provision of basic information to the executive team and relevant company personnel should, in the best of circumstances, take place prior to entering into an agreement to mediate.

Organization Support for Mediation

Presenting the idea of mediation as a potential dispute resolution practice should be presented to and accepted by the company's management team prior to rolling it out in any significant manner. You certainly do not want to find yourself embarked on a mediation and then be confronted with the stark reality that the people you need to participate in the mediation are not available or, if available, are not interested in participating. Finding yourself in such a position will surely prove to be a waste of time and will accomplish nothing other than to earn yourself disparaging comments from your colleagues on the management team.

Presenting the case to incorporate mediation into a company's dispute resolution program will begin with a definition of mediation. Simplicity is the key. Mediation is a facilitated negotiation. It is not an adjudicative procedure. Properly done it

©2011. YAR - Young Arbitration Review • All rights reserved

will be carried out in an expeditious manner (i.e., it will be done and over with in a month or two at a maximum).

As for costs (a certain question from your colleagues) the cost will involve the cost of the mediator which can be estimated on the following basis: (i) two to five days time for the mediator (cost is equivalent to that of a senior external legal advisor but may vary depending on the mediator), (ii) three meeting rooms for one or two days, (iii) travel costs for those persons from the business who will attend the mediation, (iv) costs of outside counsel to assist in preparing for and advising during the course of the mediation (if used), (v) the time of company personnel in preparing for and attending the mediation and (vi) charges of the institution involved in administering the mediation (if any).

Advantages and Disadvantages of Mediation

A discussion of the advantages and disadvantages of mediation will require a comparison and the usual comparison is with arbitration or litigation.

Potential advantages of mediation include the following:

1. Any agreement will be based on a decision of the parties and will not be a decision of a court or an arbitral tribunal. In other words the decision to agree or not rests with the parties themselves.

2. Any eventual agreement need not be limited to the subject of the dispute. Any aspect of the business relationship can be brought into an eventual settlement. This is actually a relatively common occurrence in successful mediations.

3. The process will (at least if done correctly it should) move along quickly. From the time the agreement is entered into the process should take no longer than couple of months (scheduling could prove an issue).

4. The cost, when compared to arbitration or litigation is low. However, there will be a cost and, in the event the mediation is not successful, the cost will be a sunk cost.

5. Company personnel will need to be involved, including senior decision makers in the company. The advantage of mediation as compared to arbitration or litigation is that the amount of time required will be less in the case of mediation although the time during the mediation will be intense and all consuming.

6. If successful the mediation process is much more likely to result in a scenario in which the business relationship between the parties can continue than might be the case in arbitration or litigation.

Disadvantages of Mediation

Compared to the advantages the disadvantages of mediation are fewer in number but still need to be borne in mind and discussed internally.

1. A decision to mediate will generally follow (or, in any event should follow) a period of extensive negotiations between the parties concerned. Companies with strong negotiators in their sales, purchasing or legal departments may believe that if these people are unable to reach an agreement with their counterparts there is no agreement to be had and that further discussions, including mediation are only a waste of time.

2. The other party may use the mediation process as a stalling technique or, even worse, as a means to obtain information regarding your company's position or strategy prior to entering into arbitration or litigation.

3. If one party is not interested in the mediation process and is participating only as a result of judicial or legal pressure or perhaps even due to an agreement that provides that mediation must be attempted before arbitration or litigation may be commence, they may just not cooperate thereby serving only to harder positions on both sides.

4. Finally, a mediator who does not fully understand his role may provide one or the other party with an evaluation of their position that gives that party unrealistic expectations and thereby short-circuit the mediation process.

Generally speaking these disadvantages can be managed or, in the worst circumstance, the disadvantages will be mere speed bumps in the dispute resolution process as opposed to an insurmountable obstacle.

When to Mediate?

Mediation can take place only when there is an agreement to mediate. This may occur during a negotiation period when the parties are attempting to resolve a dispute, e.g., the application of a price adjustment formula following an acquisition or the proper method for determining royalty payments further to a license agreement. One or the other party may approach the other and suggest that mediation be attempted in the face of stymied commercial negotiations. If accepted the parties may enter into a short mediation agreement that would provide, inter alia, for the following:

1. An agreement to mediate a particular dispute which is then defined;

2. the method for selecting the mediator;

3. responsibility for paying the mediator;

4. confidentiality provisions;

5. whether an institution should be utilized to manage the mediation process.

©2011. YAR - Young Arbitration Review • All rights reserved

This agreement can properly be viewed as a preliminary mediation agreement--the one that gets the process going. The principal mediation agreement will be the one between the parties and the mediator (to be addressed shortly).

The proper response to the question: "When to mediate?" is after negotiations between the parties have stalled and the lawyers have been called in but before complaints have been filed or requests for arbitration submitted. The difficulty is that this moment may be different for each of the parties concerned.

Mediation Clauses in Company Contracts

While it may be possible to agree to mediate a dispute after such a dispute has arisen, most corporate counsel will recognize that once a dispute develops the tendency of the parties is to harden their positions. In such an environment it is not easy--to say the least--for one party to take a principled approach and suggest mediation. Rather the common practice is for the parties to read scrupulously all relevant contract language related to dispute resolution. For this reason if a company decides that it wants to use mediation as a means of attempting to resolve disputes, it needs to put mediation clauses into its standard company contracts. These clauses may be inserted into agreements with suppliers, customers, business partners, etc. The choice rests with the legal department. As discussed, the actual inclusion of such clauses should follow the concurrence of corporate management and the various departments that may be involved, e.g., sales, purchasing, intellectual property, tax, etc.

A typical dispute resolution procedure incorporating mediation may involve the following steps:

1. Escalation of the dispute to the attention of certain named senior persons in both organizations.

2. Establishment of a period of time during which these persons will consult and attempt to resolve the dispute. During this time period no other actions are permitted.

3. If use of the resolution provision was unsuccessful in resolving the dispute then, before the matter may be submitted to arbitration, the parties agree that they will mediate the dispute.

4. Mediation may be handled through an institution (in which case the model clause of the institution should be used) or as an ad hoc mediation. If the ad hoc method is chosen the means of identifying the mediator, time lines and other issues should be addressed (e.g., location, applicable law, language).

5. After the parties have engaged in a mediation process and such mediation was not successful in resolving the dispute, either party may request arbitration (or commence a lawsuit in a designated court).

6. If arbitration is the final step the clause should specify clearly if an arbitration institution is to be involved using the standard clauses of the chosen institution.

7. In all cases the site of the arbitration needs to be specified as well as the applicable law, the number of arbitrators and language to be used.

As in the case of arbitration there are numerous institutions that have adopted special rules and procedures for mediation. The costs for institution administered mediation are considerably less than the costs for arbitration reflecting the short time period involved in a mediation process. Administration costs vary from institution to institution and should be reviewed before a decision is made to use a particular institution.

Mediator Selection

The success, or not, of the mediation process will depend, in large part, on the skill of the mediator. And, as opposed to an arbitral tribunal composed of three arbitrators where each party will normally appoint one arbitrator with the third being selected in any number of manners, there can only be one mediator. This means that the parties will either have to agree on the mediator or, depending on the rules that have been agreed, the institution (if an institution is used) will select the mediator in the absence of an agreement by the parties. This, in fact, is one of the significant advantages of having the mediation administered by an institution.

Mediation as a method for resolving commercial disputes is a developing area. It is gaining currency among companies and corporate legal departments but acceptance remains sporadic. A number of mediation organizations exist and, as has been noted previously, arbitration institutions have established mediation programs and listings of mediators. Training for mediators has developed significantly and most persons who are holding themselves out as mediators have received some level of training in mediation procedures and techniques. Finding the appropriate mediator will necessarily involve some trial and error. Given recent developments in mediation there will be good mediators who have significant industry and negotiation experience with less experience as formal mediators. Recommendations may be obtained from fellow in-house counsel or from external counsel who have worked with mediators.

As noted the major difficulty will be the need to reach agreement with your counterparty regarding who should be the mediator. There can only be one mediator. Compromise and discussion will be needed. Handling this telephonically as opposed to a constant exchange of e-mails is my recommendation. A discussion is the best way to move things forward. After all if you have made the decision to mediate it should be possible to agree on a mediator. As we have discussed there are costs involved in mediation as well as work. However, the mediator is not a decision maker. The decision-making authority rests with the parties. As a result the downside of choosing a less than ideal mediator is limited. Even if you are not totally happy with

©2011. YAR - Young Arbitration Review • All rights reserved

The Mediation Agreement

As noted earlier there will be two agreements involved in a mediation process. The first will be between the parties in which they agree to undertake mediation. The second will be a tripartite agreement between the two parties and the mediator. This agreement will generally be proposed by the mediator and will address a number of issues including the following:

1. The parties

2. What the mediation is and what the mediation is not;

3. Pre-mediation discussions between the mediator of the parties;

4. Conduct of the mediation including the presentation of evidence, submission of papers, expected length and location of the mediation;

5. Timing;

6. Costs and payment;

7. Confidentiality including confidentiality of documents submitted in anticipation of the mediation and confidentiality of statements made to the mediator during the mediation itself;

8. Applicable law.

Mediation Strategy

The decision to mediate a dispute is part of an overall dispute resolution process and, as a result, a basic strategy for handling the dispute will have been established. Mediation is part of this strategy. Preparing for the mediation will involve adjustments to this strategy. This will first manifest itself in the negotiation of the mediation agreement (discussed above).

In anticipation of the mediation an initial issue to be faced is whether to utilize external counsel or not in the mediation. The answer to this question will depend on questions such as (i) the amount in dispute, (ii) the issues involved, (iii) whether the internal team is familiar with mediations and is able to address the preparatory issues without assistance. Using counsel does, of course, involve a cost but, as is the case with other issues associated with mediation, the time involvement should not be great and it should be possible to negotiate a fixed fee for this type of assistance.

An initial step involved in preparing for the mediation involves a realistic assessment of your company's Best Alternative to a Negotiated Agreement (BATNA) and Worst Alternative to a Negotiated Agreement (WATNA) and Likely Alternative to a Negotiated Settlement (LATNA). These are the possible alternatives in the event of a full-blown arbitration or litigation. Coupled with these assessments you will then need to take a clear look at what negotiated settlements might be acceptable. This should be done in concert with the full team that will be present at the mediation or otherwise involved. It is axiomatic

©2011. YAR - Young Arbitration Review • All rights reserved

that sometimes the most difficult negotiations are those that occur internally. While I tend to avoid involving external counsel unless it is necessary depending on the complexity of the dispute and the strength of various internal positions their involvement in providing a different assessment of the dispute may be useful.

Setting up the team is extremely important. A primary requirement of any mediation is that each participating party include the person who has settlement authority. This may not always be possible in practice but you should strive to see that this occurs. Often only a person who has experienced the vicissitudes of the mediation itself is in a position to understand whether a possible settlement is the best available under the circumstances. The ultimate decision maker need not be the actual leader of the negotiating team but they must be involved. Given his knowledge of the dispute the company's counsel will often be looked to as the leader of the team. While this is gratifying internal counsel should resist the temptation and ensure that the business person closest to the dispute (e.g., head of sales, head of operations, head of purchasing) take the lead. Counsel should act in a support role. Other members of the team should include those persons who will be needed to reach a final decision or who may otherwise bring a necessary perspective to the mediation. Attention must be paid to ensuring that the team contains those persons necessary to its success but not so many people as to make its management unwieldy. Of course, more people can be involved in the discussion of the strategy and fewer people can be involved in the actual mediation session.

Setting the various end possibilities will necessarily involve a discussion of what is behind each possibility. Sometimes the assessment of the various outcomes will vary depending upon what facts are to be considered. Some of this information may be held by the other party (for example, the contract and supporting documents) and some may not (for example, internal evaluations of the product involved). In mediation there will be only very limited production of documents and this may only be to the arbitrator. An important part of preparing for a mediation is deciding what should and what should not be told to the mediator. This assessment will likely vary during the course of the mediation as trust in the mediator either builds or declines.

In preparing for the mediation do not forget to review a model settlement agreement. One must remain optimistic and keeping a settlement agreement on your computer that can be used is proper planning.

Accounting for Contingent Losses

In-house attorneys will always work closely with their counterparts in finance. An important part of this work relates to what should and should not be reserved in the event of a dispute. The relevant provision under GAAP (Generally Accepted Accounting Practices) is Financial Accounting Standard 5 (FAS 5).FAS 5 is the American standard. The standard under the International Financial Reporting Standards (IFRS) is IAS 37 which addresses provisions, contingent liabilities and contingent assets. FAS 5 provides that an estimated loss from a loss contingency shall be accrued by a charge to income if (i) information available indicates that it is probable that an asset has been impaired or a liability incurred and (ii) the amount of the loss can be reasonably estimated. For potential losses associated with a dispute the lower estimate of the potential liability shall be the amount of the reserve. It is important to recognize that this amount needs to be reasonably estimated. Thus, there will need to be back-up documentation, e.g., opinion of counsel (either internal or external) setting forth the basis of the liability. In the case of mediation an offer that is made during the course of mediation is a reasonable estimate of the amount of the liability and will need to be reserved for. Please remember that only the amount of the liability must be reserved. Attorney costs, travel costs and internal time dedicated to managing the dispute will need to be budgeted but do not form part of the amount reserved for the contingent liability.

The Mediation

Often the mediation will be preceded by a brief submission of each party's case to the mediator. This may or may not be shared with the other party. This issue will have been determined beforehand with the mediator. When the mediation begins it is usual that it begins with the mediator introducing the process and explaining how the day will proceed. Each party will then summarize its position. This is generally quite useful as it may be the first time the entire team on each side is confronted with the unvarnished position of the other side.

After the opening session the mediation will take on a life of its own, guided by the mediator. Often this will involve the separation of the parties into separate rooms followed by caucuses between the parties and the mediator.

An eventual agreement between the parties will need to be formalized. A final settlement agreement may require more time than is available during the session but, if there is an agreement, the essential terms should be put in writing together with a program for concluding the settlement agreement.

Post-Mediation Actions

Whether or nor the mediation results in a settlement agreement internal counsel should review the process in its entirety. Often a short briefing to the management committee will be required.

©2011. YAR - Young Arbitration Review • All rights reserved