



January 10

Starting the New Year by settling an ongoing dispute

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There is often an extra impetus to settle ongoing disputes at this time of year, to clear the decks for the year ahead. However, even if there is a mutual willingness to settle, that will not be enough if the gap between the parties cannot be bridged. Outside assistance from a mediator may help to bridge that gap.

A party wanting to start settlement discussions may suggest a “without prejudice” meeting with the other side, or the respondent may make a sealed offer to pay a specified amount in settlement of the claim.

Both these approaches have their drawbacks.

In theory, an agreement that a meeting is “without prejudice” (and therefore what is said at the meeting will not be referred to in the Court/arbitration proceedings) should encourage the parties to speak more freely. However, a party may be nervous about being seen to give any ground, or to recognise any weaknesses in its case, in front of the other side. So the meeting may end up with parties simply repeating their formal positions, followed by an exchange of settlement figures, which may be a long way apart.

A “sealed” offer is not shown to the Court/Tribunal until the end of the proceedings. The existence of the “sealed offer” may be taken into account by the Court/Tribunal in deciding who should pay the costs of the arbitration/litigation after the date of the offer. While this is an important settlement tool, an exchange of written offers and counter-offers between the parties may not, by itself, promote a dialogue between the parties about how to close the gap between them.

Parties who want to try and settle their dispute should therefore generally also consider mediation. A mediation is a confidential “without prejudice” settlement process. A neutral and independent third person is appointed by the parties as mediator to facilitate this process. The mediator does not issue an award or decision. His role is to steer discussions between the parties and provide guidance to help them to reach a settlement.

Mediation has a number of attractions: the process is flexible and innovative solutions may be found, taking account of commercial or other interests, which would not be available through litigation or arbitration, and the process allows parties to negotiate their own settlement, and to achieve this relatively quickly.

Generally, each party makes a brief position statement to the mediator about the dispute. The parties may then continue to discuss issues in a joint session or have separate private discussions with the mediator. As the mediation develops, there is likely to be a series of separate private sessions with the mediator, together with further joint sessions. Through this process, the parties will be able to consider the strengths and weaknesses of their legal arguments and the valuation of their claims, and will be able to do so more candidly in their private discussions with the mediator than they



would want to do in a joint session with the other side. The mediator will also try to bottom out the parties' real concerns and commercial positions.

While a mediation is likely to be more expensive than a "without prejudice" meeting, or an exchange of offers and counter-offers, the mediation process often helps parties reach a settlement where the other settlement processes would not. So any New Year resolution to try to settle an ongoing dispute should include considering whether to suggest mediation to the other side.

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