Putting the 'commercial' into commercial mediation

Mark Kelly

By Mark Kelly

In New Zealand, at the top end of commercial dispute resolution, mediation still has an image problem. An outstanding commercial lawyer I know has described it as: "an expensive talk-fest".

A prominent commercial litigator recently said to me: "if I want to settle something, I'll just go and have a coffee with the person on the other side" (presumably he buys). Another described mediation as: "an essentially manipulative process". And I have heard others say: "I only mediate cases I think I am going to lose".

In the mediation world, these are the rantings of mad men, Lears on the heath. To converts, the value, efficacy and broad applicability of mediation are unassailable articles of faith. And there is both statistical[1] and anecdotal support for the proposition that mediation helps commercial cases to settle. But I know these lawyers to be intelligent, considered, and highly focused on settling cases that need to be settled.

The disconnect

So, why the disconnect, and what can be done about it? How can mediation be made more attractive to commercial players? How can the "commercial" be put into commercial mediation?

Part of the problem lies in perceptions of mediation. Despite having been around for years, it is still much misunderstood.

There is a perception that mediation is formulaic and unscientific. An executive described mediation to me thus: "... the lawyers on both sides restate their cases and then you get into a meet in the middle shuttle diplomacy". This is the kind of comment that will cause us mediators to weep into our mung beans. But sadly, some mediations do work that way. They should not. They can be as tailored and scientific as the parties want. More on this below.

I also think that the commercial world does not perceive, or sufficiently value, the intangible (or uncountable might be a better way of putting it) benefits that mediation can bring.

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There is a sense that concepts like catharsis, mutual empathy, and relationship building/rebuilding are not so important in commercial disputes. Rather, they are for what Arnold Schwarzenegger would deplorably describe as: "ze girlie men". That is simply wrong.

Charles Flint QC is one of the preeminent banking and finance lawyers in the United Kingdom. In banking and finance, almost everyone thinks they are a commercial Arnie. But Mr Flint is a keen advocate for the utility of mediation in that sector. He states that: "... it would be a mistake to assume that banks or financial institutions ... are immune to emotional or personal factors affecting the decision-making process"[2]. And he has described post-GFC client-bank mediations over allegedly mis-sold financial products where: "(a)ll the energy in the mediation was devoted to extracting the parties from the embittered relationship"[3]. In my experience, embittered relationships are rife in commercial disputes, can be a major impediment to settlement, and are best addressed in mediation.

Inherent inequalities

The perception that mediation is a manipulative process stems in part, I believe, from a view that well-funded litigants (insurers, councils) use it as a tool to bully others into cheap settlements.

There may sometimes be something to this, but it is a reflection of a power dynamic which can affect any settlement between such parties, and indeed any trial (since the well-funded party will inevitably be better prepared, and quite possibly better represented), assuming others can even get the matter that far. So the issue lies with inherent inequalities in the wider world, rather than being a fault of mediation per se.

In mediation, the parties are certainly guided and encouraged towards settlement. In this, it must be acknowledged, mediation can be a subtly manipulative, as almost any human interaction can be.

But United States academic David Hoffman suggests that parties actually seek and accept a degree of such manipulation when they sign up to mediate[4]. It should also be emphasised that parties to mediation have a greater degree of control over their own destiny therein than they do over any other aspect of litigation.

Overcoming the perceptions, or misperceptions, above, would no doubt help make mediation more attractive to commercial players. Education, discussion and promotion must be the apt tools here.

Mediation can be better

But the problem is not merely in the eye of the beholder. It is wrong to just blame the commercial world for not getting it.

Mediation can do better too. It can be much more commercial. By that I mean, in large part, that it can be made so that participants are better informed, and can be assisted to make more rational and considered decisions. Mediation can also be made more cost-effective.

One area for potential improvement lies in format.

In New Zealand, we are very much wedded to the all-in-one-day mediation model. These often work, and are a known quantity. But they can be clumsy for sophisticated commercial disputes, and they are not the only way.

Top United Kingdom mediators, such as Kiwi Tony Willis, get involved in tailoring mediations to specific disputes. The possibilities here are endless, but options can include: targeted pre-mediation information exchange, agreement on obtaining pre-mediation non-binding opinions on discrete legal issues, agreement on processes for narrowing or resolving issues between experts, and/or staged mediations for multiparty disputes. However the tailoring is done, the purpose is to help parties to take the blindfold off before they pin the tail on the donkey.

Another area for potential improvement is mediator preparedness. There is a school of thought that, because the mediator's role is facilitative, the mediator does not need to know anything about the case in advance of the mediation. I disagree. I think that, if possible, commercial mediators should have a good working appreciation of the case before they mediate, to be able to best serve the parties. Referring again to banking and finance disputes, Charles Flint QC has said:

"So what does one need as a mediator to be best placed to settle these disputes? I would emphasise the need to **understand the transaction**, not just its legal form but its commercial aim and how it was designed and intended to operate. ... Only with that understanding can you **gain the confidence** of the parties, **speak their language** and be best placed to guide them to a solution. Preparation is all."[5]

Evaluative input

Next, a controversial topic – evaluative input from mediators in mediations.

In New Zealand and the United Kingdom (but not the United States), the predominant view within the mediation establishment is that mediators should not provide evaluative input.

There are good reasons for this predominant view: even well prepared mediators will not know the case and the applicable law as well as the participants/their lawyers; the mediator might not be as skilled a lawyer as s/he is a mediator; providing evaluative input can compromise the neutrality of the mediator; and, it is better to encourage the parties to work out the problem themselves.

But commercial players can be surprised, and disappointed, to learn that mediators may not give evaluative input. The sense is: "why pay someone we all respect to help us, but not get to hear what they think"?

The establishment position is also, to a degree, disingenuous. Mediators are encouraged to reality test the strength of litigants' cases in private sessions, and there has to be an evaluative aspect to the choice of questions asked in that regard.

My own view is that, if a major weakness in a case seems apparent in open session, it is in order, and indeed important, to say in a private session with the party who has the weakness something along the lines of: "I don't know the ins and outs of this as well as you guys, but what was said in open session on topic x didn't make much sense to me/seemed to me to be readily answered by the limitation point, etc. Tell me what I missed". A hopefully nuanced approach that sends the right signal, without pushing anyone into a corner, or overstepping any boundaries.

Professor Andrew Goodman has put it a little more bluntly in his argument for evaluative input: "... the mediator should not permit the reality of the situation to be clouded by the party's self-delusion"[6].

Preparation

A brief word for the gatekeepers: the litigation lawyers who refer their cases to commercial mediations, and represent their clients at them. Much has been written on how they could do their jobs better so far as mediation is concerned[7].

Preparation is obviously extremely important, as is providing the client with a truly rigorous cost/risk analysis, and thinking ahead about how settlement might be configured.

My sense is that, while there will always be room for improvement, New Zealand lawyers are really developing in this area. They need to, because, if they do not, the work will be taken off them. As previously noted in this publication, in the United Kingdom, mediation body CEDR has noted a huge increase in direct referrals to

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Arbitration treaties could help settle international disputes

A new instrument that will make settling international disputes far more accessible – the Bilateral Arbitration Treaty (BAT) – will become a reality within three to four years, eminent international arbitration specialist Gary Born predicts.

Will they come to New Zealand in that time? "Optimistically yes," he says.

Mr Born visited New Zealand earlier this month hosted by Victoria University's New Zealand Centre for International Economic Law. While in the country, he talked with the Government and the business community about his idea of a BAT regime.

The BAT "provides a neutral dispute resolution mechanism – international arbitration – for international commercial disputes between businesses that operate in New Zealand and the territory of another state," he says.

Under the treaty, if a commercial dispute arises, the default position will be that the dispute is resolved by arbitration. However there will be provision for people to make contracts that opt out of the default position.

These treaties, Mr Born says, "will promote international trade between especially (but not exclusively) New Zealand's small and medium sized enterprises (SMEs) and the businesses of the treaty partner.

"It does this by reducing one of the most significant barriers to international trade for businesses: the costs and risks associated with dispute resolution, especially litigation."

The BAT will sit comfortably alongside already existing free trade agreements as well as being able to operate as a stand-alone treaty between New Zealand and another state or states. In both cases, the BAT will be an additional tool fostering trade between New Zealand and another state or states.

"The basic concept of the bilateral arbitration treaty is that if you step back from the way international commercial disputes are currently resolved and ask yourself: 'could we do that better?' the answer is 'yes'.

"The idea of parallel court proceedings producing two sets of legal expenses, conflicting judgments – neither of which can be enforceable – is a very unsatisfactory way to resolve disputes."

An alternative was to include arbitral agreements in international contracts, but that was something that was frequently not included in contracts, particularly contracts entered into by SMEs.

"The default mechanism of the bilateral arbitration treaty is a better way to do it," Mr Born says.

A BAT would do two things.

"It would provide a boost to international commerce because companies would have less legal uncertainty and risk than exists under the

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mediation from in-house counsel – from nearly zero to just over one-third of its cases in 2012[8].

The dispute resolution world tends deeply to cynicism. It is unlikely that, for commercial mediation, the participants will ever have the passion of the proponents. Former England Court of Appeal Judge Sir Allan Ward might be overstating it when he says: "(s)oon only the ostrich will refuse to mediate"[9]. The odd Kiwi might sometimes still skip it too. But if some misperceptions about commercial mediation can be corrected, and if mediation practice can become more sophisticated and applicable, the "commercial" can indeed be put into commercial mediation. ■

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1 Eg, *A Case for Mediation: The Cost-Effectiveness of Civil, Family, and Workplace Mediation*, Paper by Sarah Vander Veen, January 2014. See also: *http://courtadr.org/library/effective.php*.
2 *How to Master Commercial Mediation*, David Richbell et al, Bloomsbury, 2015, p170
3 Ibid, p171
4 *Negotiation Journal*, July 2011, pp300-303
5 See n2, p172
6 See n.2, p250
7 Eg, *Advising and Representing Clients at Mediation*, Stephen Walker & David Smith, Wildy Simmond & Hill Publishing, 2013
8 The Law Society Gazette, "*Commercial mediation: resolution revolution?*", Grania Langdon-Down, 30 September 2013
9 See n.2, vii