

ICAEW SERVICES

# SETTLING COMMERCIAL DISPUTES BY MEDIATION

In settling disputes, mediation can be a better option, as **Arthur Harverd** and **Wolf Von Kumberg** explain.

The traditional methods for resolving commercial disputes are either litigation or arbitration. But these can be lengthy, expensive and damaging to the commercial relationship. Hence, over the last two decades, mediation has become increasingly popular. Mediation is a process in which the disputing parties, assisted by a qualified mediator, attempt to settle the dispute by themselves. Critically, this means the parties remain empowered.

Mediation is voluntary and confidential, with no unwelcome publicity. The disputing parties can walk away from the mediation at any time and then proceed to litigation or arbitration. Where mediation leads to a settlement, however, the agreed terms are recorded in writing. By

signing the settlement document the parties are then contractually bound by the agreed terms.

Mediation administering bodies report that up to 80% of mediations reach a settlement that the disputing parties can live with commercially. Compared with litigation and arbitration, mediation is a low cost and speedy form of dispute resolution (most mediation hearings lasting just one day). Unlike a court judgement or arbitration award, in mediation a 'win' for both parties can be achieved.

The following seven steps could help a disputing party achieve a successful outcome in a mediation:

- give the company's representative at the mediation full authority to reach a settlement or decline to settle;
- ensure the representative is accompanied by a mediation-experienced lawyer and is aware that mediation is a forum for the parties to express their respective views (rather than for the lawyers to simply restate the legal positions);
- where the dispute involves considerable financial and/or

technical detail, ensure the company's relevant in-house specialists also attend the hearing, to help advance its case effectively;

- provide copies of all documentation relevant to the dispute, as directed by the mediator, before the mediation hearing. The mediator and participating parties should have a basic understanding of each party's position at the outset;
- understand the strengths and weaknesses of the company's case and those of the opposing party. Be prepared to concede points gracefully, where appropriate, and work out the upper and lower amounts at which you will be prepared to settle. Plan an exit strategy if no settlement is reached. What does the alternative look like? Is it acceptable?
- mediation can be initiated at any stage of a dispute and can be attempted more than once as the position of the parties begins to converge. It should not be seen in isolation; and
- where possible build a stepped dispute resolution clause into any contract, to ensure that mediation is employed at some step in the dispute process.



Wolf Von Kumberg is the European legal director and assistant general counsel to Northrop Grumman Corporation and a member of ICAEW's Commercial Disputes Resolution Panel. [wolf.vonkumberg@euro.ngc.com](mailto:wolf.vonkumberg@euro.ngc.com)



Arthur Harverd is a consultant with Carter Backer Winter, and a member of ICAEW's Commercial Disputes Resolution Panel. He is a chartered arbitrator and accredited mediator. [arthur.harverd@cbw.co.uk](mailto:arthur.harverd@cbw.co.uk)

## ICAEW MEDIATION SERVICE

ICAEW has recently established a unique mediation service under which two co-mediators are appointed for each case; one a leading lawyer, the other a senior accountant. Their combined expertise enables them to assist the disputing parties with the legal and financial issues in the case, making settlement more likely. Contact Paul Turner, head of commercial dispute resolution at ICAEW.

T +44 (0)20 7920 8792

E [info@resolvingcommercialdisputes.com](mailto:info@resolvingcommercialdisputes.com)