



Negotiate and stay out of court - the case of mediation in real estate

23 Mar 2018

Mediation is growing rapidly in popularity as a dynamic and multi-faceted practice in many countries, which has been increasingly integrated into both new and existing legislation.

What mediation is about

A generally accepted description of commercial mediation in many territories is, that it is a voluntary, non-binding, private dispute resolution process in which a neutral person helps the parties to reach a negotiated settlement. A core principle of mediation is that the parties negotiate, control and "own" their outcome.

Consequently, this contrasts with other forms of dispute resolution in which external interveners judge the case and take decision, such as arbitration, adjudication, expert determination as well as court proceedings. In contrast to often long-term and costly open-ended litigation, the aim of mediation is to empower the parties to make their own decisions on the contentious issue



The mediator undertakes a neutral role and attempts to facilitate communication and negotiations between parties; helping them to develop solutions, identify and consider alternatives, and reach a consensual settlement satisfactory to the parties in dispute. Requests for mediation services may be initiated by either party to a dispute provided that both parties have mutually and voluntarily agreed to pursue dispute resolution as an alternative to litigation and that the underlying contract or agreement contains an 'alternative dispute resolution' clause.

Thus, for example, the standard mediation clause used by RICS reads as follows:

Disputes

- i) The parties agree to seek to resolve any dispute, which arises during the continuance of this [Lease] [Agreement] or upon or after its determination amicably and in good faith by negotiation in the first instance.
- ii) If the dispute continues to be unresolved then the parties agree to attempt to settle it by mediation and will jointly source the mediator from the list of mediators approved by the President of the Royal Institution of Chartered Surveyors.
- iii) If the identity of a mediator cannot be agreed by the parties the mediator may be nominated by the President of RICS on the application of either party.
- iv) If the dispute is not settled at mediation in accordance with this clause within a period of twenty working days or such longer period as may be mutually agreed after the appointment of a mediator, either party shall be entitled to resort to any other process for resolution that is expressly or impliedly provided for in this [Lease] [Agreement] or litigation.

Internationally operational organisations in particular have long since abandoned their prejudices with regard to the out-of-court conflict resolution - especially in the form of mediation.

For example, mediation has been a self-governing process in the US since the 1970s in a regulated and widely accepted form, and this approach has been followed widely in Europe, Oceania, the Middle East, South East Asia, Central and South America and sub-Saharan Africa. The use of alternative methods for conflict resolution is also anchored in Great Britain and is the subject of specific EU directives and legislation.

Procedural characteristics

The procedure of the mediation follows certain principles and is controlled by the mediator. Different phases and descriptions of the individual phases can be found in the literature. The phase illustration below reflects five phases, which ideally build up on one another and are encompassed by a preparatory and solution transformation phase.



PRE-MEDITATION: Application by one or both of the conflict parties to a mediator. Alternatively, application through a professional body.

Stage 1: opening by the mediator; details of the rules and process are discussed and recorded.

Stage 2: parties express their viewpoint which enables the mediator to identify mutual understanding of the precise areas in dispute.

Stage 3: hardened positions are now omitted and hidden interests are disclosed. Mutual understanding is increased through the uncovering of motivations.

Stage 4: comprises the development of solutions. The parties jointly elaborate and evaluate the different opportunities for resolution. The objective is to find a win-win solution for each party.

Stage 5: after amicable agreement, the mediation process is closed with an exact definition of the consensus and its legal structuring where applicable.

Post-mediation: Realization of resolution process through parties, potentially counseling with mediator.

Image: Mediation process

The first phase ("opening") serves to explain the principles and procedures of the mediation case and to establish the trust of the parties in the procedure on the one hand and, in particular, in the person of the mediator on the other hand. Furthermore, it is necessary to define negotiating rules, which support the later course of the mediation. Formal aspects such as timeframe, places and costs (transfer) may be addressed.

In the second phase ("appraisal"), each party is given the opportunity to describe their position and thus, in their view, the background and history of the dispute. In doing so, the mediator will strive to identify various aspects of the conflict as well as possible disturbances on the relationship level through targeted questions and a neutral summary. This phase is often characterized by accusations and past-oriented perspectives. In the second phase, a common understanding of the conflict cause and thus the "topics" of mediation need to be formulated and prioritised.

In the third phase ("interests") it is the objective to direct the parties' view into the future and to explore the economic and personal interests and needs of the parties. It is regarded easier to reconcile interests and to take account of the opposite side than opposing positions. Thus, the dispute is often already reduced once the parties become aware of the interests of the other side and possible coverage equality for partial interests becomes evident. In the third phase, concrete objectives as well as common and conflicting interests are identified and the respective understanding of the view of the other side is developed.

The step from position to interest is therefore often called the critical point in mediation and a key challenge, as the parties may not want to disclose their "true" interests, or because of lack of reflection, they do not have sufficient knowledge about their interests. Even in real estate disputes, it is sometimes not only about money: significant interests, which may be hidden behind positions, are often human basic needs (security, economic well-being, sense of belonging, recognition and self-determination). Researchers also refer to nine guiding values in the context of identification of interests: freedom, security, recognition, power, harmony, intensity, integrity, caring and curiosity. As far as the mediator considers as reasonable and helpful, individual discussions with one party ("caucuses") can be carried out by the mediator during this phase.

Subsequently, in the fourth phase (resolution opportunities) concrete solutions are identified and evaluated by the parties. In doing so, as many solution options as possible are to be collected, which could serve to settle the conflict. Methodically, creativity techniques such as brainstorming or mind mapping can support the process. Following the collection of solutions, these are subjected to an examination for their feasibility and priority. It is useful to examine to what extent the solution options satisfy or even impair the respective interests and needs of the parties.

It is in the third and fourth stages of mediation that an evaluative mediator will typically draw on her experience and expertise to assist the parties gain a clearer understanding of their case. Unlike a facilitative mediator, she will express an opinion on aspects of the case, but should always and only do so to empower the parties to make a better assessment of their route to settlement, rather than to replace the parties assessment with her own.

The fifth phase ("final agreement") concrete, amicable solutions are fixed in writing and then submitted to the respective lawyers or other involved consultants for examination. In the wording care must be taken that solutions are feasible and measurable, as well as dates and responsibilities are clearly assigned. This is intended to minimize the risk of new disputes over the mediation result. If the parties wish, the enforceability of the contract can be ensured by notarial authentication.

Challenges in mediation process

Typical disputes in real estate

The real estate industry is characterized by a considerably high conflict potential - by e.g. high complexity of the business processes, numerous parties involved in value chains, potential divergences in interpersonal interactions and interests. Further escalation of conflicts is due to regularly incomplete or rather fragmentary contractual binding of partners involved in real estate activities. Some examples of real estate-related disputes are relating to conflicts between:

- buyer and seller arising during the transaction process (increasingly cross-border transactions),
- investor and financing partner,
- landlord and tenant,
- landlord and service providers,
- developers and "authorities"
- construction partners,
- valuation processes and results, and
- organisations and employees.

Conflicts in the real estate sector can rapidly engender obstinate positioning on both sides. A focus on purely legal aspects of a conflict typically exclude alternative solutions. Turning to the courts to resolve disputes seems to be an almost instinctive reaction in the real estate industry in many jurisdictions. However, in many cases, such focus may lead to a possibly long-term and costly litigation with an open end. Therein, options of agreement beyond judicial focus are not fully explored and valuable chances are wasted.

Cross-border/ -cultural issues

Real estate truly developed into a global industry with impressive cross-border investment activity. Differing business processes, subtle cultural nuances and interpretations, and corporations from different common law and civil law backgrounds may result in additional conflict potential. In an opaque business environment, numerous counter-parties, and

new (emerging) market risk exacerbate the potential for divergences in relation to interpersonal interactions and professional interests. Real estate transactions are being made between parties who have different expectations of both the outcome of negotiations and the process itself, which may result in severe disputes.

As such mediation offers a great and almost unique opportunity to settle disputes which may result from cultural differences. Within the mediation process awareness between the parties can be built - inter alia – on cultural differences in language and verbal as well as non-verbal communication or body language, unequal approaches to time and its management and relationship values. Finally yet importantly, approaches to negotiation and problem-solving and the interpretation of contracts may differ significantly in the context of cross-border transactions since cultural background as well as individuals have their own style of deal making.

Appointment of a “suitable” mediator

The selection of a suitable mediator constitutes a key challenge for parties in dispute. A skilled mediator will have received specific training in all aspects of the mediation process and competencies. Above that, it is to be noted that real estate disputes are frequently complex, they require a skilled, knowledgeable and objective mediator with a high level of integrity and experience in the real estate sector. A mediator with extensive front-line experience in the real estate industry may be seen as a benefit to the parties in dispute as such mediator will be able to provide impeccable business judgment and the ability to identify areas of agreement, isolate key issues, prioritise and address those issues, and ultimately, devise strategies for resolution. It is important for mediators to understand the art of the deal, the inherent risks, the bottom line, and the potential for miscommunication that can occur between even the most well-intentioned parties involved.

In case of cross-border cases as described above, there is great value in the mediator using intervention skills that are culturally fluent in facilitating the parties to (re)building trust, recognising unconscious biases, finding commonalities, and also in being able to frame interests in such a way that the involved parties feel that they are gaining. The mediator’s capability to function effectively across national, ethnic and organisational cultures can be vital to minimise cultural misunderstanding.

Crucial is that the mediator must be acceptable to all the parties being invited to come to the table. In case of parties in dispute not having access to a mediator of their choice, they can obtain support from established institutions. In the real estate sector, RICS with its Dispute Resolution Service is the world’s oldest and largest provider of alternative dispute resolution (ADR) services in the land, property and construction industries.

Limitations

Mediation of course also has its limitations. The key concern is that all parties need to be committed. It’s no good having one party in favor for a mediation and the other party wanting their day in court. It must be by mutual consent and willingness to positively consider mediation as a real option. It is fine if parties have very different motivations such as no good BATNA (Best Alternative To a Negotiated Agreement), an opportunity to create value, a desire to improve relationships, pressure from coalition partners.

Also with regards to the experience of the authors, in complex real estate disputes – especially in cross-border cases - it is important that those attending a mediation process have the authority to settle the dispute, or at least that they have access and lines of communication open to those with such authority.

Summary & Outlook

Mediation is a strong tool for dispute resolution for the real estate industry, which in many cases allows conflicts to be resolved efficiently delivering sustainable results and a high level of confidentiality and self-responsibility. Experience shows that approximately 80% of all mediation cases result in a settlement of the case. Since real estate typically is a reputation sensitive sector with a great importance on long-term partnerships, mediation can create significant value in dispute situations.

Judicial enforcement often leads to ‘win-lose’ solution and may not take into account the wider effect on business partnerships, business relationships and future objectives, all which are often crucial in the real estate sector. In contrast, mediation and the self-driven responsibility of parties has a great chance to be successful in providing enduring results. Mediation provides a forum in which parties can gain a better understanding of each other, and work together to identify and discuss their interests and explore options for resolution.

A culture change towards dispute resolution away from combative and dispute-heavy business relationships to a more collaborative partnership approach takes time. A further development in conflict behavior besides allowing for a meditation for an actual case is to include dispute resolution clauses as a standard into agreements, which require the parties to mediate any dispute that might arise between them.

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