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It takes two.

Do you mediate or arbitrate? As Niall Lawless explains, a combination of the two approaches could be the answer.

Mediation has a lot going for it. It is a private, informal dispute resolution process that can commence when direct negotiations don't seem to be getting anywhere. About 70% of mediated disputes are resolved by the parties. But that means that about 30% of mediated disputes are not resolved.

When one of the UK's leading building services contractors and a top tier manufacturer of air handling equipment found themselves in dispute they were keen to mediate. But they wanted to be sure that if they could not reach agreement, someone else would make a decision for them, quickly. The matter involved the supply and installation of about £500,000 of air handling equipment, with just more than 25% of the contract sum in dispute.

To provide the certainty these parties wanted, I offered them a hybrid process: arbitration/mediation. This is low cost but also guarantees that a decision will be made on the day – either agreed by them or decided by me. An agreement or a written reasoned award that is binding on the parties and which if necessary can be enforced through an application for summary judgment is the result of the arb/med process.

Arbitration is usually more expensive than mediation so it might seem sensible to do the mediation first. But with the same person acting as arbitrator and mediator, allowing the decision-maker to have lengthy private discussions could have given the losing party reasonable ground to suppose loss of impartiality Glencot -v- Barrett [2001]. So arbitration had to precede mediation. It was agreed I would sit as arbitrator in the morning and, after I had completed a reasoned award, assist the parties as mediator in the afternoon. If the mediation were successful, the arbitration decision would not be given to the parties.

Good arbitration with mediation requires that although there is to be arbitration (which is adversarial), proceedings are conducted in a way that minimise the conflict. In this dispute neither party was being represented by lawyers, so one of my duties was to roadmap the process and set clear expectations as to what was required from each party and when. Part of the preparation was to make both participants confront the reality that they each risked an unfavourable decision. This understanding can be an important ingredient in ensuring that the parties mediate with commitment.

I also had to stay very alert to the responsibilities of my role. When one of the parties rejected a possible compromise that I knew was very much in their best interests to explore, I had to put the award out of my mind and continue the mediation as I would without this privileged information.

I also prepared myself for the dilemma that I would discover things during the mediation in the afternoon that would lead me to a conclusion that the binding award was plainly wrong and unjust. Indeed, during the mediation new information was introduced – fortunately, though, it confirmed the decision in the arbitration award and did not undermine it.

I had hoped to act as arbitrator in the morning and act as mediator in the afternoon, concluding a written award between 12.00 noon and 2.00 pm. But there simply wasn't time to document my reasoning. I was able to quickly switch my mindset from arbitration to mediation, but the parties were not and seemed to remain locked into the adversarial process. I came away on the day thinking that having more time between the two strands of the process would be beneficial and should not be faster than arbitration on the morning of the first day and mediation on the afternoon of the second.

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