



Deal mediation: Resolve issues as they arise

Using a mediator during the early stages of a transaction helps ensure neutrality.

By **Stephen Morrison**

OVER THE PAST TWO DECADES, business people and their professional advisers have come to appreciate the merits of alternative dispute resolution, mediation in particular, as an effective and efficient way of settling commercial disputes. Anecdotal evidence suggests that when parties come to the mediation table voluntarily, 80 to 90 per cent of those cases are resolved without further litigation. Why then restrict such an effective tool to resolve litigious disputes?

Although most complex commercial transactions such as mergers, acquisitions, distribution agreements, long-term leases, etc., are successfully completed, many fall apart for the wrong reasons. While in some cases irreconcilable differences arise during the negotiation, due diligence, or closing phases of the transaction, often, the deal collapses because the parties lack the necessary skills to creatively resolve issues as they arise. In other cases, deals do eventually close, but only after months of unnecessary delay, with all of the attendant additional costs. It is in these situations that the involvement of a capable mediator can keep the deal on course by facilitating constructive discussions and by crafting creative solutions.

Few complex transactions come off without a hitch. At every stage, issues arise. Disagreements frequently arise concerning matters such as asset or

inventory valuations, environmental contamination, responsibility for past service obligations, union agreements, or contingent liabilities, to name a few. In relation to the overall benefits of the deal, the financial implications of these issues may be relatively small, but they can easily escalate if not handled sensitively. The front line players in these transactions, being the lawyers for each side, are naturally inclined to try to get the best deal for their own client. While some lawyers are temperamentally well-suited to the negotiation process, there are many sad tales of deals falling apart because the lawyers' egos got in the way. Similarly, the parties' investment bankers are financially motivated to see the deal completed, and this may impair their judgment in the eyes of their own client and the other party.

A deal mediator is a neutral party retained at the early stages of a potential transaction and is paid equally by both sides, to ensure continued neutrality. Probably, but not necessarily, a lawyer with training and experience as a mediator, this person will have a background in transactional work and in business. Early on in the process, the deal mediator will meet with the parties and their lawyers to establish a timetable for the various stages of the process and set the ground rules for dealing with disputes as they arise. The lawyers will agree to bring any significant issues to the

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attention of the mediator as soon as it becomes apparent that disagreement exists. In other words, the mediator's services will be engaged before the issue has a chance to escalate. By prior agreement, the mediator will have access to the lawyers or the party representatives without restriction.

In addition to facilitating the resolution of disputes, the mediator will meet periodically with the party representatives and their lawyers to ensure that the timetable is being respected. In addition to resolving disputes, once familiar with the transaction, the mediator can also play a role in facilitating discussions between one or more of the parties and outside third parties such as auditors, investment bankers, securities regulators, commercial lenders, union representatives, and even significant customers; while retaining a neutral stance between the contracting parties.

There is precedent for this in the world of large construction projects, where mediators are often appointed

at the beginning of a project to ensure that disputes are quickly resolved, so that construction and cash flow continues without interruption. While the appointment of a deal mediator in large commercial transactions will add another cost to the process, it will be insignificant in relation to the dollar value of most transactions and may pay for itself many times over. ■

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