The Rise of Mega Mediations #2

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*Having looked at **The Rise of Co Mediation in Mega Mediations** last month and the challenges such cases pose for mediators, let's get a little closer to the inner workings of these mediations, especially at the intake stage.*
So many moving parts – the people, the paper, the posturing – like a long haul plane sitting on the tarmac, how do these huge mediations ever get off the ground?

Well, they are surprisingly graceful once airborne and if done right, mega mediations become manageable as part of a well designed mediation process – because it is only really mediation (arbitration can't, litigation can't) that can provide a comparatively efficient platform for an all-party resolution of multi party, multi issue (often cross border) legal disputes.

For a commercial mediator, some principles won't change whatever the size of the mediation; prompt contact with the lawyers, sufficient time and documentation to read in properly – and a full tank of gas on the day.

But, if normal mediations are from Venus, these mega mediations come to us from Mars.

So, when the phone rings on the desk of a commercial mediator, what happens then?

Very first steps: For me there are two things that immediately need to happen.

The first is to understand where (if anywhere) the logistics are up to… how far along is the planning?

Second, I need to get my arms around the dispute early on, before doing much else. By that I mean getting basic information to gain a general feel for the players, their relationships and the competing claims and responses. I normally do this by an amateurish wiring diagram on my iPad mapping out all the moving parts, so I have the dispute on one page. This will inevitably become more sophisticated as the dispute reveals itself over time.

Initial meetings: Once I have that basic information, I can make some educated recommendations around a range of intake matters – these include basic documentation to be provided and setting up initial meetings with a mix of players, often not so much the individual parts but more likely to be combinations of interest or affinity groups however I need to be developing an in depth understanding of the dispute to do this right.

These meetings inevitably involve discussion of substantive matters but also allow the mediator to advance *process* (around position papers, common bundles, attendance (less is more), experts, authority and the like) so that everybody is on the same page about what will happen in the lead up to, and when they meet on, mediation day.

More important than in smaller mediations, and probably more valuable for the mediator than for the lawyers if I am honest, these meetings provide a unique insight into how things might go when the parties get together. Sometimes they will individually highlight areas of unknown consensus but more usually identify where the hot spots are. Hugely valuable intelligence for the mediator.

Sometimes the order of these meetings is important for properly understanding the key legal and factual issues to be mediated – or at the very least, sequencing can be sensitive. Transparency is the key.

Clarity on costs: Early on we need clarity around costs – often a fraught area in large multiparty mediations. There is typically a party hierarchy – lead players, follow-on parties or bit actors with marginal relevance but who want to be in the negotiation loop (although not really able to influence it) and often litigation funders and insurers inhabit the shadows – all of whom have the potential to complicate who is paying for the mediator and the venue.

It depends, but a useful rule of thumb is any entity with an independent position to advance in the dispute should be paying a share or, even more simple, anyone who has their own lawyer shares the bill.

Who is in charge?: Someone needs to take control and plan these large gatherings – sometimes the mediator will be forced to do that and while the role is not quite that of a party planner, it can be time-consuming and distracts from core duties (just getting dietary requirements can be a nightmare – who knew that Lacto-Ovo Vegetarianism is a thing?).

Other times the mediator will have the luxury of dealing with a mediation committee tasked with making process decisions – but perhaps more common is where one well resourced law firm has taken the lead, primarily around communicating with the mediator and arranging the venue and has become the accepted point of reference for all involved.

The important thing is not that the mediator *control* intake but that the mediator have *input* early enough – because if left to counsel, organisation can languish and become needlessly combative given the high stakes occupying their every waking moment.

From a mediator's perspective, there's no doubt there is more people management and less connection with the participants in these large mediations – and possibly more caucusing than is healthy – but mega mediations reward a mediator's instinct and experience in so many ways.

If you would like to read part #1 of this post please click **here**.