

# Kluwer Mediation Blog

## What is the Definition of Success in Mediation?

Alexander Oddy (Herbert Smith LLP) · Thursday, December 1st, 2011

One of the things that has been exercising me for some time is the question of what constitutes success in commercial mediation. I ask the question because the experience of the London office of my international law firm – which has attempted to gather data on mediations in which we have participated for nearly 15 years – is that settlement rates on the day of the mediation have declined since the early years of the 2000s and presently hover at about 50/50. I emphasise that I am talking about settlements on the day itself. Are the disputes (by their nature large scale commercial matters) less susceptible to resolution in a one day mediation? Are parties become more sophisticated and perhaps more Machiavellian in their approach? Are mediations taking place earlier in the dispute cycle with the risk that the disputes are not ripe for resolution? Is a one-day mediation somehow simply not as effective as it was to resolve such disputes in a well-developed market such as England?

The question of mediation success was debated recently at a seminar in London that my firm hosted for the New York based ADR organisation, CPR Institute, at which we were fortunate to hear the personal perspectives from in house counsel at a range of major organisations: BP, Shell, Chartis Insurance, Glaxo Smith Kline, Lloyds Banking Group and the UK's Financial Services Authority (which regulates organisations in the financial services and insurance sectors).

My hypothesis was that the explanation for the declining settlement rates that we have observed was not as important as understanding whether the mediation was adding value to the overall process of resolving the dispute regardless of whether a settlement was achieved on the day of the mediation. That is because, as I see it, the mediation process may be used to allow parties to gather necessary information for settlement, identify and allow constructive engagement between appropriate decision-makers and allow the parties to appraise their strengths and weaknesses candidly in an environment that allows them to explore their underlying interests. If mediation leads to settlement on the day then it has plainly succeeded on any view. But even if it does not, it seems to me it is a success if the result of the process is that the conditions for settlement on a later date (weeks or months hence) are either created or materially advanced. Mediation doesn't have to be one sort or the other exclusively – let's label them "settlement mediations" and "exploratory mediations" for convenience. The flexible nature of the process is such that it is not susceptible to rigid categorisation. Some issues may progress to resolution explicitly or through simply being abandoned while others are explored and understood better so that an agreement can be reached at a later date. The mediation is "successful" as long as either or both outcomes are capable of being recognised by the participants – and that will be the case for most mediations in which parties participate in good faith, even if they are sceptical as to the prospects for settlement when they

embark on it.

So much for my theory – what did the in house counsel think? Unsurprisingly there was a range of views. Some felt that it was unwise – or at least unnecessary – to try and label a mediation as successful if it did not yield an actual settlement. That was simply making an excuse. The whole point of the process as they saw it either from a commercial perspective or in terms of fulfilling their required objectives (as a regulator, for example) was settlement.

Others felt that looking for success outside of a settlement was, in effect, seeking only to justify inadequate preparation for the mediation day by parties. Issues around engagement and information ought to be addressed before the mediation day so that the parties attend in a position to settle on the day.

Yet others pointed to the fact that in large organisations one needed to look beyond the immediate conflict with the counterparty. It might be that the mediation process was worthwhile and therefore successful (irrespective of the outcome) if it allowed an in house counsel to show an organisation's management or external commentators that all available steps had been taken to avoid the escalation of a conflict to a more formal dispute resolution process.

Further, large organisations might see mediations as successful if they provided a forum for non-commercial counterparties to explain their views and feel that they had been listened to. In other words, the mediation that allowed a corporate Goliath to engage in a meaningful and personal way with a David in the form of an NGO, a local community, or a disenchanted private individual could be successful just for achieving that end.

Unsurprisingly the discussion was brought to an end with little consensus as to the definition of success in mediation. What was clear, however, was the range of situations in which the process might be beneficial – “successful”- was far more diverse than any one speaker would have articulated from their own perspective.

So what is the point of the question – why does it matter to try and define success in mediation? For me, the value of asking the question and at least trying to answer it is because the process of growing mediation use has always been about an act of persuasion to encourage parties in conflict to try something new or to use a familiar process in a new context. Mediation is not so obviously “a good thing” to those who have never tried it (which mediation enthusiasts need to keep in mind). So the exercise in persuasion to try mediation in a new context or at all in any given dispute is, rather obviously, made easier when it is a story that can be couched in terms of success. As commerce becomes ever more international and parties of differing cultures and experiences encounter conflict, they will also encounter new and diverse opportunities to try mediation. The ability to articulate how mediation has assisted parties in different situations – how it has been a “success” – assists all those engaged in the business of using growing and promoting mediation.

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