Kluwer Mediation Blog

The Rise of Co Mediation in Mega Mediations

Geoff Sharp (Brick Court Chambers / Clifton Chambers) · Thursday, May 3rd, 2018

With the rise of the mega case – often funded class actions – a unique challenge for mediation is emerging.

It is just as Danny McFadden says in his recent post on China's modern day silk road initiative Big Projects, Big Disputes – Bring in the Mediators;

> "mediation is a proven dispute resolution tool for disputes involving vast sums of money, multiple and diverse stakeholders and complex commercial and personal issues"

I would go further and say that mediation is the *only* dispute resolution process that can, from a practical perspective, handle these big cases effectively and efficiently – where there are tens of thousands of claimants and multiple responding parties divided into a number of natural groupings. These claims are nearly always litigated in some form – often done with half an eye to conditioning them for mediation a long way off into their future.

And of course, while all those participants don't ever turn up to the eventual mediation, when these mega cases do arrive in the mediation room, large numbers of people nevertheless arrive with them.

I have always considered the optimum number of participants at the mediation table in a commercial dispute to be around 15 – 20. It seems to me, in terms of pure numbers, this brings a critical mass to the mediation that keeps the energy up, allows a variety of voices to be heard but retains the intimacy that so often fuels mediation, both in joint session and when the parties retire for private discussions.

But the mega case is in a completely different league – while there comes a point when it is no longer a mediation and more like a town hall meeting, these cases attract large teams of lawyers, third-party funders, experts of all hues, often an elected mediation committee or two for the claiming parties and of course, representatives from the normally corporate responding parties – and numbers can climb: very commonly to 50+ seats around the table but not unheard of to have 100 at the mediation.

Recently, mediator Bill Wood QC and I were involved in a mediation with around 70 people

attending. The only convenient venue for the parties was at the Royal Courts of Justice Rolls Building located off Fetter Lane, Central London. There we had access to one of UK's 'super courts' designed to handle the largest international and national high value disputes together with around 15 of the 55 consultation rooms. And while every mediator knows the court house may not be the ideal venue for a mediation, often the parties are comfortable there and it can be the only place that offers the kinds of facilities mega mediations require – as well as lending a certain vibe to the mediation that sometimes works for and sometimes works against getting to 'yes'.

With these numbers come extraordinary challenges for the mediation process, both logistical and practical.

Enter the co-mediators.

While conventional wisdom has co-mediation being considered for a variety of reasons, including combining complimentary skills and expertise, providing a balance in terms of gender, age, culture and language where appropriate, my experience is that co-mediation is considered primarily in two situations in the commercial sector;

1. in mega cases
2. where the claimant and responding groups are incapable of agreeing the identity of a single mediator – so they appoint one mediator each, arbitration style

Clearly, while claiming and responding groups appointing a mediator each cuts across much of what we hold dear in mediation and belies a fundamental misunderstanding of the mediator's role, the process is all but doomed if the mediators see themselves as mediator for 'their party' and much more could be written on this topic.

However, I am happy to report, this is rarely the case for mediators but appointment in these circumstances is a development to be watched and, in my view, discouraged. For one thing, it often means mediators of different stripes (both philosophical and style) find themselves working together and quickly tripping over each other. Much better to appoint mediators who have worked together before and are hand in glove.

As one party once said to me when considering my co-mediator, "we need to avoid 2+2 = 3"

In fact, it needs to equal five.

For an insight into one of these mega-cases and a 2+2=5 combination, take a look at Eric Green and Jonathan Marks' short article about their co-mediation of the Microsoft anti-trust case of a few years ago;

> Mediators never kiss and tell. But within the bounds of appropriate confidentiality, lessons can be learned from the three-week mediation marathon that led to Microsoft's settlement with the Department of Justice and with at least nine States…

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