

Kluwer Mediation Blog

When all that remains is the fight over the money – how a ‘mediator bid’ can be helpful.

Alan Limbury (Strategic Resolution) · Thursday, June 22nd, 2023



There are usually numerous issues to be resolved in mediated commercial disputes, for example:

- whether a relationship should be continued or terminated and, on what basis;
- the terms upon which any litigation should be settled;
- what, if any, money should be paid by one party to the other and, if so, when and how.

It can be frustrating when the parties get stuck on the amount of money to be paid when everything else appears to be virtually resolved.

The challenge of the impasse over the money

Mediators often find themselves carrying offers from one room to another (whether face-to-face or, more often these days, virtually), only to find that the parties are very far apart and unwilling to be the first to make any significant concessions to the other.

I encourage parties to make their offers to each other directly, for two reasons:

- If there is any degree of complexity in their offers, they are more likely to articulate them correctly than I am; and
- If the recipient asks a question regarding an offer that I have conveyed from another party, I have to return to that party to find out the answer. In the meantime, the recipient tends to read into their understanding of the offer the most sinister of interpretations. However, when the offeror conveys the offer directly, the question can be answered immediately, without provoking mistrust.

How the ‘mediator bid’ can be helpful

When the only remaining issue to be determined before everything is agreed is the amount of money to be paid, it can often be helpful to ascertain from each party privately whether they would be prepared to agree to a process whereby they will each confide in me confidentially their “bottom line”, – the maximum one party will pay and the minimum the other party will accept – and I will then tell them, without disclosing what their numbers are, whether or not they are within a previously agreed range.

Often each party will agree to this process on condition that other party will also. Ideally, the range to be agreed should be as narrow as possible, so that, should their bottom lines turn out to be within the range, they know it may nevertheless be possible to bridge the gap, sometimes by extending the time to pay.

An additional element of this process, that I have found to work well, is for the parties to agree that, as possibly the last step I take as mediator, I may put a number on the table, not necessarily the mid-point between their bottom lines, and they may then choose whether or not to agree to that or another number.

One advantage for the parties seems to be that, because it is the mediator articulating the number, it does not engender the kind of mistrust parties often attribute to anything proposed by the other side. I experience it as acceptance by the parties of the credibility of the trusted facilitator who does not have ‘skin in the game’.

How the ‘mediator bid’ plays out

I cannot recall an occasion when the process was declined nor any occasion when it failed to produce an agreement – however not necessarily an agreement on the number placed on the table by the mediator.

There have been occasions when the parties’ bottom lines are outside the previously agreed range but they have nevertheless somehow managed to reach agreement on a number within the range. And there have been occasions when, known only to the mediator, the maximum the payer said it would be prepared to pay turned out to be more than the minimum the payee said it was prepared to accept. Again, the mediator’s number, not necessarily the mid-point, was agreed and everyone could go home satisfied with the deal.

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