

Navigating Commercial Disputes in Mediations in an Unprecedented Global Economic and Political Landscape

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Since early 2020, with the start of the COVID-19 pandemic, the modern world has been living in a truly unique set of circumstances. Our daily lives, as well as most—if not all—of our business dealings, continue to be impacted. And just as we were starting to better digest and understand the “new normal”, the world was hit with yet another somewhat unprecedented global crisis, namely the Russian invasion of Ukraine. It has highlighted the interconnectivity which marks our interactions across the globe. Whether it's a worldwide wheat shortage or a spike in energy prices, the current political framework is having broad and significant repercussions on supply chains, transport and financials generally. Commercial transactions have suffered directly as economic metrics have changed overnight. It has also become quasi-impos-

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sible to predict future prices and behavior. All of these factors have tended to motivate parties to turn to mediation to try to resolve their commercial disputes. At the same time, they have made mediating such disputes significantly more complex. Below I will explore those complexities and suggest some mediation strategies to address them.

Lack of Real Precedents and Unclear Judicial Outcome. Parties look to mediators to offer them an independent assessment of the strength of their legal arguments should the case move to an adjudicative process. Litigators counseling their clients may even view such guidance as the centerpiece of their mediation negotiating strategy. However,

many disputes that have arisen during the pandemic crystalize issues that are new and for which judicial guidance is simply unclear. Consider for example shipment delays due to global closures that led to goods being received by a purchaser too late for their intended purpose or perishing in transit. Add to that the fact that, even had they been received in time, the purchaser would not have been able to forward such goods to end-consumers in a timely manner for similar reasons. We could spend hours scrutinizing the contracts, circumstances and applicable laws. Yet, the specific facts are likely to be such that it would be impossible to predict with any convincing reliability how a court would assess the unanticipated events and determine who bears the risk of such events. Many contracting parties may want to turn to the most common “go to” clause in unforeseen circumstances, namely the “force majeure” clause that we see in most commercial contracts. Do the COVID-19 facts fit the definition? If so,

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until when? How about the global repercussions from the Ukraine crisis? For the time being, the answer is simply “we don’t know.” A tough answer for parties and their counsel to accept but one that has generally become the correct one. Faced with such real uncertainties, mediators are unable to offer effective arguments regarding judicial guidance on these issues. Accordingly, a mediator’s role has to shift to convincing parties and counsel to accept such uncertainty and avoid basing their negotiation strategy on judicial outcomes.

Indeed, a corollary to this shift in role is the challenge for a mediator to also convince counsel of the uncertainty of their own legal analysis. I recently had a case where counsel was adamant that the court would interpret and rule in their favor based on precedent. However, the specific circumstances were such that a strong argument could be made that COVID-19 negated any such precedent. Not only could I not validly offer guidance on potential judicial outcome, I also needed to persuade the parties that establishing their negotiation posture on the basis of who’s legal argument was stronger was a futile exercise. This may require separate one on one discussions between the mediator and counsel: The mediator must try to engage counsel in a realistic legal analysis that often goes against some very firm positions. It may also contradict advice counsel had previously shared with their client. This task can truly be an uphill battle for a

mediator, but a necessary one to tackle.

Reevaluating Parties’ Opportunity Costs and Accepting New Economic Realities. Both the pandemic and the crisis in Ukraine have led to significant increases in costs throughout supply chains. They have also changed our way of living and, more generally, the value we attribute to various goods and assets. Mediating parties often have to accept the harsh reality that the metrics which formed the basis of deals that were made pre-COVID and pre-Ukraine crisis are often no longer applicable. If the parties were to move their case to court, the judge would determine who bears the risk of such changes based on their contractual arrangements. Any judicial order that is then issued would necessarily have to fit within the confines of their initial inked agreements. In mediation, however, it is not uncommon for both parties to have a substantial incentive to revisit the terms of their contractual arrangement. This could arise even if one party may have a strong legal argument in support of their position. In such cases, parties are motivated to put the prior terms behind them and negotiate new terms. Mediation may therefore be the only option for the relationship- and the parties- to survive.

Simply put, the opportunity cost for parties hurt by the change in economics have generally changed. Their negotiating positions must therefore be adjusted accordingly. The real estate industry provides



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some good examples: A commercial landlord may have a lease that calls for a firm rent that is no longer justified based on less foot traffic and change in population lifestyle. The landlord may be able to get a judgement in their favor pursuant to the lease but would they want it if it would lead to a bankrupt tenant? Wouldn’t it be in the landlord’s interest to work with the current tenant to adjust their rent instead of trying to find (and accommodate) a new tenant? This may be particularly true considering that a new tenant would likely come in at a lower rent, after a vacancy period, and require additional spending in broker fees, new tenant improvements, etc. ... This thought process can be applied to a broad range of industries and circumstances. In those instances, the hurdle to finding a mutually agreeable settlement isn’t necessarily agreeing the final terms of the settlement. Rather, the challenge is working with the parties for them to let go of their attachment to pre-crises metrics. They need to accept that it is in their interest to focus on the new realities in order

to preserve a valuable commercial relationship. The mediator's first task is therefore to work with the parties and their counsel to try to instill a present-day assessment of a party's alternatives based on the new economic and social realities and not the past. A forward-looking approach to the mediation and negotiations is therefore imperative.

The Weakness of Forecasts. Uncertain economic times make it difficult for parties to gage the opposing side's opportunity cost and calculus generally. Typically, parties base their negotiating strategy on the specific circumstances as well as the general economic trends and factors. Given the current global state of affairs, it can be difficult to make any such forecasts or predictions with enough accuracy to establish a sound negotiating posture. We know that there will be a significant shortage of wheat supply, that it will lead to price increases but have the markets already built in such price increases in some areas? How will that impact global trade and traffic? There are so many new variables and many more that can arise from such new variables, all of which impact all of our dealings. Predicting the opposing party's reservation point or their best and worst alternatives, and even establishing one's own, are overwhelmingly difficult exercises. A mediator must alert the parties to the weaknesses of these forecasts. I don't believe that it is productive to disregard them but rather to acknowledge the potential for significant

variations and highlight the arbitrariness surrounding the analysis. The mediator must work with the parties to identify the factors that are particularly difficult to predict and bring to their attention new factors relating to the uncertainties of the future. This is a task that a mediator undertakes generally in all mediations. However, in the current environment, this is one that likely requires more input from the mediator. At times, it will also entail more massaging with the parties to convince them of the validity of the opposing party's position and potential holes in their own position in light of the increased volatility.

Heightened Need for Pauses During Mediation. Pauses in mediations can sometimes disrupt momentum. At other times, they can give parties time to digest information and rethink their positions. Given the numerous legal and financial uncertainties we're currently facing, I believe that the benefits of pauses outweigh their risks. I would even argue that breaks are necessary: There are so many question marks regarding the future that it may be difficult for parties to immediately appreciate their impact on both their own analyses as well as that of the opposing party. Pauses give parties the opportunity to rethink these matters and discuss them with counsel as well as the mediator. It allows them to re-evaluate the various positions with a better understanding and appreciation of the facts and variables. Generally, they give parties time to digest some

potentially surprising information and do their own research.

The uniqueness of the current political and financial landscape has definitely motivated parties to reassess their commercial dealings and re-evaluate their negotiating positions. The shock of the past and uncertainties of the future re-affirm the benefits of mediation. Indeed, it is the only form of dispute resolution that allows the parties to agree to terms outside of their pre-agreed arrangements. It is also an exercise that has become more challenging in light of the legal and financial uncertainties as well as the potential variables in future outcomes and events generally. A mediation's success requires that all constituents agree that there is a "new normal" that will generally involve more potential global uncertainties, beyond the typical ones we've generally learned to take into account in establishing negotiating strategy. A mediator must face those realities and work with parties and their counsel to accept them and incorporate them when establishing their negotiation posture.