Mediation in three dimensions

Dr Robert Gaitskell QC, Keating Chambers

MOVIE HITS TODAY are sometimes released in 3D. It gives a whole new perspective to film. The same applies to mediation: View it in three dimensions and the whole process comes alive. Those dimensions are found by looking at the dispute from the different positions occupied by firstly the mediator, secondly the parties and, finally, their lawyers.

A problem takes on quite different hues when addressed from these different standpoints. This approach highlights what is likely to help and what is likely to hinder the achievement of a deal. Let's try a case study.

The hopeless hospital

Florence Nightingale would not have been happy. The private hospital (for Madoff Private Equity & Health Care) was finished four months late. The employer blames the contractor and (surprise, surprise) the contractor blames the employer. JCT terms apply and there is an arbitration clause. Claims Conscious Contractors plc (CCC) dashes off an adjudication notice.

Madoff is infuriated when the notice arrives and instructs Barracuda and Shark (B&S), the well-known construction law solicitors. B&S knows Madoff dislikes high-cost disputes and sends a letter to CCC proposing mediation immediately. CCC (proprietor: Cliff Claimsman, Esquire) views this as time-wasting and agrees only on the basis the 28 days continue to run. Now what?

Max the mediator

Max is used to being appointed at short notice. He also knows the construction industry well. He knows a concurrent delay from a critical path at 50 paces, so he's the man. What does he need to get a deal?

Firstly, Max needs to know the parties' positions. Short and pithy position papers are just the ticket. A copy of the contract is a bonus. A copy of the adjudication notice and a few key letters setting out the parties' complaints is enough to be getting on with.

Larry the lawyer's clients love mediation, and when they get a deal they love Larry (which Larry loves).

Secondly, Max needs parties that are well prepared on the day. This is not the same as parties who are totally immersed in their arguments about the delay claim. What will help a deal are parties who have identified the key issues and who know their strengths and weaknesses on those issues.

Finally, Max needs an efficient venue. It can be in a solicitor's offices, a hotel or the International Dispute Resolution Centre in Fleet Street — but it must open early, close late, have endless coffee and biscuits, a flip chart, and three rooms (one for the plenary sessions, and one each for the parties). Max will use the big room for the opening session, with everyone present, where he starts by getting one and all to introduce themselves. Then he will invite each party in turn to make a statement setting out their positions. After that, the parties retire to the smaller caucus rooms.

Max then gets to work, weaving the magic of his shuttle diplomacy. Eventually, perhaps around early afternoon, the time will come when Max may want to put the two decision-makers, Cliff and Mickey Madoff, together to talk (with Max holding the ring). A deal is then on the cards.

Cliff the client

Cliff is the claimant. He also needs three things to get a deal. He's head honcho of CCC and his speciality is yelling above the noise of a concrete mixer and telling his workers about their suspect parentage. But not today. Today Cliff, just like his opposite number Mickey, needs a clear head. He needs to know two figures.

The first is what figure will he put on the table at the mediation when negotiations start. This is vitally important and can often determine the success or failure of the day. Cliff is bringing the claim, so he wants money. His adjudication notice says he demands £100,000. If, come early afternoon, he simply marches into a meeting with Mickey and restates his demand for the full sum, the chances are Mickey will (a) turn puce, (b) walk out or (c) all of the above. So, instead, Cliff will have been encouraged to adopt a more nuanced approach.

Perhaps he will start with a figure of, say, £80,000, explaining why he is discounting for the irrecoverable costs of the adjudication (and maybe even the arbitration) that he will otherwise have to fight. One thing Cliff must take into account is what he has already said to Madoff in earlier negotiations. What he shouldn't do is pitch his opening demand at the same level (or even higher!) than he has had rejected by Mickey in the past. All this will do is annoy Mickey.

If Cliff is wise, he will discuss his proposed opening figure with his team privately before he puts it on the table. In that way he will avoid any gaffe which his lawyer could have pointed out. If he is particularly astute he will canvas his opening figure with Max, prior to revealing it to the other side, just in case there is some reason why pitching the figure in a certain ballpark will be counter-productive.

The second figure Cliff needs is his final figure. This really does mean his final figure. It's not the lowest figure he feels entirely comfortable about. It's the figure that he simply cannot go below. Without that level of recovery he has no choice but to fight on to the bitter end, incurring huge sums in costs, and running all the substantial risks of adjudication and arbitration, and wasting all the management time that goes with such a war of attrition. Maybe this figure is about £55,000, and represents the sum that he actually paid out for the prolongation period.

Max, if he is wise, will probably not ask Cliff what his final figure is until very late in the process. He may never ask, and instead simply leave it to Cliff to produce it when the time is right. The problem with Cliff revealing his bottom figure to Max too early is that Cliff may thereafter feel he can't go below it, even though he subsequently wants to reduce it to do a deal.

The third and last thing Cliff needs is an open mind. He needs flexibility to take on board what he hears from the other side and from Max. In particular, Max will have a private session with each party where that party's weaknesses will be explored; in their legal arguments and in their facts. Max will engage in a little gentle reality testing. Max will ask questions designed to reveal the difficulties Cliff will face if he eschews a deal and fights on. What is the litigation risk that Cliff won't establish that the employer caused all the delay? Is it only 30%? Is it 50%? What witnesses can Cliff produce to support his view of what happened? Jack (the lad) Smith? Will Jack stand up to rigorous cross-examination by some clever-clogs barrister? So Cliff has an expert's report from Shyster Claims Consultants Inc. Will that report stand up to close scrutiny? When preparing his report, to whom did Mr Shyster speak? What documents did he look at? If there is no deal, what is the spectrum of possible outcomes? What is the best alternative to a deal (hooray, Cliff wins!)... and the worst alternative (disaster, Cliff pays big money, plus interest, to Madoff!)? Then there is the costs question. Perhaps that derisory offer from Mickey Madoff isn't so bad after all?

Will Jack (the lad) Smith stand up to rigorous cross-examination by some clever-clogs barrister?

Larry the lawyer

Larry, of B&S, loves mediation. Or rather, Larry's clients (particularly Mickey Madoff, for whom he now acts) love mediation, and when they get a deal they love Larry (which Larry loves).

The chances of a deal are really high: 70% upwards, depending on the type of case. This saves the vast costs of adjudicating and arbitrating or going to court. Larry also needs three things to get a deal.

Firstly, Larry needs to know exactly what his case is, and what is the case for the other side. Without that knowledge, he won't be able to take an informed view when the offers are bandied about. Also without it, he won't be able to engage with Max when the latter opens a private caucus meeting with Larry's team by saying: *"Let's talk about the problems you face in defending this claim!"* The second thing Larry needs is a detailed knowledge of what costs have been incurred thus far, and the prognosis for the future, right to the end of a long arbitration. Max is definitely going to ask Larry for this information. The costs and the wasted management time (which are most unlikely to be recovered) involved in fighting on are big drivers towards a settlement – but only if Larry knows what they are.

Finally, to get a deal Larry needs to know the likely shape of the mediation day, so that he can prepare his client for it, and so that he knows what to expect and doesn't feel exposed. If Max doesn't volunteer this information prior to kick-off (usually at about 9.30am) then Larry can specifically ask Max about the way things are likely to develop.

Every mediator has their own style. Some make more use of plenary sessions than others. Some like putting the decision makers together at various points through the day so that they get to know each other and so are more easily able to do a deal when the time is right. Some like keeping tight control of the time and will announce at the outset that a deal is expected by 5pm — and will then push everybody forward, knowing that once 5pm has passed everyone gets brain-dead, the process loses momentum and terms will still be being debated at midnight when the IT support has gone and the agreement can't be printed off Larry's laptop. (Oh, yes! Larry must have a laptop at the mediation, pre-loaded with all the boiler-plate clauses Larry will be wanting, including, for example, a confidentiality clause.)

Strategy

So, looked at from the perspective of the three different stakeholders — the mediator, the clients and the lawyers — it is clear what needs to be done and who needs to do it, and why it must be done.

Regardless of the strategy, the teams may have decided upon prior to the start of the mediation day, the crucial thing is that everybody involved should be proactive throughout, constantly looking for ways to move the process forward. Given the very high success rate mediations achieve, a party has to try really hard not to get a deal!

Dr Robert Gaitskell QC, Keating Chambers
Dr Gaitskell is a practising Queen's Counsel in Keating Chambers, London, where he specialises in engineering disputes. He is a chartered engineer as well as a barrister, and regularly acts as an arbitrator, mediator, expert determinator and dispute board chairman/member. He is a former vice president of the Institution of Engineering and Technology and is a CEDR accredited mediator.