

Deal Mediation: A New Use for an Old Friend

By Joan Stearns Johnsen^[1]

The topic of Deal Mediation was presented by the ABA in an ADR Section Teleconference broadcast on February 6, 2008. The speakers included:

- Hesha Abrams, Mediator, Dallas, Texas. Ms. Abrams has been a mediator for over twenty years and has settled thousands of commercial matters. She has also served as a Deal Mediator in numerous of multi-party, multi-million dollar deals;
- L. Michael Hager, President of the Education for Employment Foundation (“EFE”), Washington, D.C., Prior to forming the EFE, Mr. Hager was the Executive Director of Roger Fisher’s Conflict Management Group in Cambridge, Massachusetts as well as the co-founder and Director of the International Development Law Organization, a public international organization in Rome, Italy;
- Professor Jeswald Salacuse, Henry J. Braker Professor of Law at the Fletcher School of Law and Diplomacy, Tufts University, Medford, Massachusetts. Professor Salacuse also teaches at the Program on Negotiation of Harvard University, Cambridge, Massachusetts, and is a member of the Program's executive committee. He is the author of *The Global Negotiator: Making, Managing, and Mending Deals Around the World in the Twenty-First Century* (Palgrave Macmillan, 2003) and the recently published *Seven Secrets for Negotiating With Government*(AMACOM Books, 2008).
- Michael Leathes, Mediator and Executive Director of the International Mediation Institute, The Hague. During his over thirty-seven year career, Mr. Leathes has been a party and also a mediator in numerous matters and spoken throughout the United States and Europe on many topics in the area of mediation. In addition, Mr. Leathes has held a series of in-house corporate legal roles including that of General Counsel of Pfizer International Inc and of International distillers & Vintners.

It was my privilege to moderate.

There was little disagreement as to the importance of this topic only some perplexity as to why it is not as widely accepted as one might expect. This is especially true given the similarities between the recognition that third party neutrals add tremendous value in the context of international treaty negotiation, labor negotiation, and alternative dispute resolution. Everyone agrees that as the concept of third party neutrals assisting with deals is more widely known and understood, its benefits will be appreciated, and it will become more widely utilized. Deal mediation is among the most exciting developments on the evolving landscape of facilitated negotiation and mediation.

During the teleconference, Mr. Hager addressed how he and his colleague

Robert Pritchard conceived of the use of neutrals in the negotiation of deals. Professor Salacuse discussed various ways in which Deal Mediation is comparable to Alternative Dispute Resolution. Mr. Leathes provided his viewpoint on developments in this area in Europe as well as his perspectives not only as a mediator, but also as a former in-house counsel and potential client. Ms. Abrams addressed issues relating to when and how Deal Mediation is most effective.

There was extensive discussion about how well the presence of a third party neutral works, ideas on promoting the wider acceptance of third party neutrals in Deal Negotiation, and likely future trends. The panelists shared their perspectives during the webcast. There was a shared consensus that the deal mediator is “counsel to the deal” not to any of the parties, and as such plays a unique role. Additionally, unlike in settlements, when negotiating a deal, closing may be just the beginning of the relationship; consequently, deal mediators are often invited by the parties to remain involved on a retainer post-closing to facilitate implementation, anticipate tensions and serve as a source of continuity even after the investment bankers and other party negotiators have moved on.

What Is It?

Deal Mediation is a new application of an existing process. All mediation is facilitated negotiation. Deal Mediation is the facilitated negotiation, by use of a neutral third party, of business transactions where there exists no dispute to resolve.

Skilled mediators use various techniques to resolve conflict in various contexts. In addition to the widespread acceptance of Mediators in ADR, we, also, readily accept third party neutrals acting as Ombudsmen resolving workplace issues; Diplomats brokering treaties; and Labor Mediators hammering out contracts. The next frontier is transactions. Deal Mediation is the recognition of the value added by third party neutrals in negotiating and closing complex, multiparty, multicultural transactions often including those in mergers and acquisitions. As they do everywhere, third party neutrals help to facilitate the negotiation and provide a more certain path of success.

Third party neutrals or Deal Mediators can make the difference between success and failure in the negotiation of business transactions. In most transactions, Clients expend substantial resources in identifying an attractive opportunity. They engage in costly and time consuming due diligence. They hire teams of lawyers and investment bankers. They forego other attractive opportunities. Nevertheless a large percentage of deals collapse at various stages of the negotiation. Most parties to the negotiation never know why. Most often the reason a negotiation collapses is unrelated to the merits of the underlying deal. It is frequently due to an impasse in the negotiation. Skilled third party neutrals identify and break through impasse associated with closing these transactions.

Comparison of Litigation Mediation and Deal Mediation

It is now largely accepted that mediators add value in negotiating litigation settlements. Neutrals can help parties to more objectively view their negotiating position. They manage the interpersonal dynamics, and facilitate the negotiation itself. They keep everyone on track towards their objectives. The presence of a skilled neutral in the negotiation can make the difference between success and failure. It may be difficult to realize the resistance that once existed to this now obvious conclusion.

The same factors that could cause a dispute settlement to fall apart are identical to those that can cause a business transaction to fail. Third party neutrals employ a variety of interest based negotiation techniques to avoid impasse in a settlement negotiation. Third Party Neutrals also use the same techniques and philosophies to avoid impasse and to close the deal or transaction.

In any negotiation, impasse ostensibly arises when parties fail to reach agreement on terms. But often the failure to identify mutually acceptable terms is due to ancillary factors such as miscommunication, misunderstanding, and mistrust. Parties fail to understand their own interests and that of the other side. They overlook opportunities for mutual gain. Emotions trump reason. Skilled neutrals navigate these barriers to agreement in business transactions as well as in litigation settlements.

Furthermore, in complex, multiparty, multibillion dollar, multicultural negotiations, these dynamics are especially complex. A skilled third party neutral can help manage not only conflicting personalities and interests, but also clashing cultures which can arise whether or not parties live in different parts of the world from one another and speak different languages.

Yet another similarity between alternative dispute resolution and deal mediation is that those new to the concept are interposing the identical objections litigators once raised to oppose the use of mediators in settling litigation matters. Most notably, transaction lawyers argue that they have historically negotiated directly and do not need the assistance of third parties. They further dismiss deal mediation claiming that third parties would only add to the expense and would delay and unnecessarily complicate the process. At some level, often unstated, is the concern that the presence of a third party neutral would diminish the role of the transaction attorney. All of these objections were raised and proven wrong in the ADR context.

The presence of a deal mediator does not replace the transaction attorney it liberates him or her. When freed from the dual task of closing the deal and representing a client, the transaction lawyer can be a more zealous client advocate. Client Counsel can focus on negotiating on behalf of the client without the concern that extreme positions or personalities might derail the entire deal. Deal Mediation does not replace direct negotiation rather it enables and optimizes it. It is an additional tool for difficult circumstances when direct negotiation is ineffective. As in ADR, third party neutrals do not add to the expense. They save time and money by providing the desired result with more certainty and efficiency.

Conclusion

Facilitated negotiation is a valuable tool in any negotiator's tool belt. A third party neutral can help to navigate difficult dynamics and avoid the unnecessary failure of a negotiation. Deal Mediation is the application of these successful principles to the negotiation of business transactions.

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