

Why court should be the last resort for small businesses in dispute

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Benjamin Franklin wrote that life's two certainties are death and taxes. I can think of a few others, and for most businesses, dealing with disputes is an unavoidable (and unwelcome) feature of existence. Conflict, whether it involves third parties (such as suppliers, customers or landlords) or arises within the business (for example at management level or between employees) can be difficult to deal with, and consume frightening amounts of financial and other resources. Handling disputes effectively and efficiently is therefore critical.

Unhappily, however, commerce in the UK was long ago conditioned by a culture of litigation: traditionally, when a dispute escalated so that we felt unable to resolve it ourselves, our default response was to pick up the phone to our lawyer and demand legal action, with all too predictable results. It is a shame that mediation – a dispute resolution tool capable of producing better results for all involved – was often overlooked. Until recently, that is.

The cost of court

Whilst going to court does at least guarantee an outcome, that certainty comes at a heavy price. Litigation is usually expensive, often horribly so. And not just financially, but also by absorbing the time and energy of those involved, pulling them away from more profitable activities, and often exerting a heavy psychological burden. It's a frustratingly slow and rigid process that runs for months or even years on the public stage. It is by definition risky, and often delivers a result that is costly for all involved; the grim satisfaction of having 'won in court' is usually the best that can be hoped for, and even that tends to come at a financial price in legal costs. Finally, it can (and usually does) damage relations beyond repair.

A better way

Mediation is a very different concept. Essentially a negotiation facilitated by a neutral third party professional, it offers some obvious advantages. As a flexible process designed around the needs of the parties and the dispute, it can respond more directly to concerns and grievances, and deliver bespoke agreements that provide what the parties want in a way that is often well beyond the limited powers of a judge. It is confidential, protecting the parties from unwanted publicity, and by comparison to litigation is usually much cheaper and much quicker – typically representing a fraction of the cost and time of court proceedings. It is also effective at protecting and even repairing relations, allowing parties to continue their dealings with one another afterwards if they choose. Finally, it's extremely effective; statistically, something like 85% of mediations are successful, meaning that the parties reach agreement in the overwhelming majority of cases.

For these reasons, mediation is increasingly supported, and in some cases required, by the legal system. Judges are penalising parties who decline mediation without good reason, and for many experienced commercial litigation lawyers committed to protecting their clients' interests, mediation is now the default response to an emerging dispute.

The nuts and bolts

A mediation generally takes place over the course of a day at a mutually convenient location. It's an informal process involving a series of discussions – sometimes involving all parties, sometimes with just the mediator, but with the parties remaining in ultimate control of the format. The aim is to explore the dispute and how to settle it in the way that works best for everyone. Because it's all without prejudice and non-binding, difficult subjects and potential solutions can be freely explored without risk. Where, as is the case in the vast majority of mediations, the parties reach agreement, they commit to it and it becomes legally binding. And thus, the dispute is over.

A changing culture...

Mediation is a remarkably effective process. Its shift into the dispute resolution mainstream, especially for large corporates, is old news; it appears increasingly inevitable that, in due course, mediation will be preferred over litigation by most parties in all kinds in dispute. In the meantime, amongst the small business community it is deployed less often than it should be. This, it seems, reflects a lack of awareness. And yet, as I explain above, there are good reasons to treat mediation as the first port of call when things start to go wrong – whether in relationships with others, or within the business. One way of insuring this is to include, within contracts, a requirement to pursue mediation before resorting to more adversarial forms of dispute resolution. Failing that, the suggestion of mediation is often enough to alert those on the other side that there's a better alternative to litigation. The earlier this happens, the better, before positions become entrenched and legal costs escalate.

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