

To mediate or not to mediate? View point from an insurance law practitioner

07 OCTOBER 2016

CATEGORY:
ARTICLE

In recent years, there has been a slow but steady movement for parties involved in an insurance dispute to choose mediation as a way of resolving their differences instead of engaging each other in an expensive, stressful, and time-consuming legal battle in court or in an arbitration tribunal and ending up with an outcome they might not be happy with. If you reach an impasse in negotiations with an insurance company over the settlement of your insurance claim, you may wish to attempt mediation before jumping into the courtroom or arbitration proceedings.

BASICS OF MEDIATION

In mediation, the parties involved in a dispute come to the negotiating table with a neutral third person (the mediator) who is trained and experienced to help them come to a mutually satisfactory solution of their conflict. Mediation is entirely voluntary. It only happens if both sides request it, and a settlement of the dispute through mediation is reached only if both sides agree to it. The mediator does not make decisions or give opinions. If the parties themselves do not agree to a solution, they go back to where they left off before mediation.

BENEFITS OF MEDIATION

- **Greater flexibility and control:** Courtroom processes are strict and rigid. There is a process that parties must adhere to at all times. In a typical trial, the respective lawyers will present their respective clients' Opening Statement, followed by cross-examination of the witnesses and Closing Submissions. Whereas in a mediation setting, parties are in control and the process is informal as the purpose is to allow each side to have its say without the burden of special legal procedures, and without fear that if they say the wrong thing they can 'lose' in the dispute.
- **Quicker and less expensive:** A mediation session usually takes one day to complete and is less expensive than a typical lawsuit. The cost of mediation is usually split equally between the parties. The lawyers also spend less time preparing for a mediation session as opposed to a full blown trial. Therefore, it is cost effective.
- **Creative solutions:** Parties can explore non-legal remedies and solutions. Parties can focus their attentions on their needs and interests rather than on their legal rights and remedies. For example, in a professional indemnity case involving a dispute between a house buyer (Claimant) and his property agent (Respondent), the Claimant requested for a donation to be made in the Respondent's name to an organisation of her choice as a term of the settlement.
- **Confidential:** The mediation process is confidential, unlike a court process which is usually public. This means whatever either party says or reveals during mediation cannot be used in later stages of the dispute and there is no media publicity or attention.
- **Preserves relationships:** Mediation can help to preserve relationships that would likely be destroyed through years of litigation. Because it is collaborative, rather than adversarial, commercial relationships can often be saved.
- **In a public liability case involving a structure which collapsed and killed a person walking past it, the parents of the deceased were very aggrieved and demanded for a huge sum of compensation. The Defendants in that case, namely the event organiser and builders of the structures, were blaming one another for the structural defect. During the mediation session, the Defendants were able to offer condolences to the deceased's parents and the deceased's parents eventually agreed to settle at a reasonable amount. On the other hand, the Defendants, who terminated all their existing contracts with one another, managed to patch back their relationships and continue to work with each other on other projects.**
- **Greater compliance:** Finally, because it is mutually agreed upon, compliance with the mediated settlement is generally higher than with lawsuits as it is a consensual process.

CLOSING THOUGHTS

With the myriad and diverse types of disputes within the insurance industry (insured vs insurer, insurer A vs insurer B), it is certainly worth considering the merits of referring the disputes to mediation rather than the adversarial process. In order to achieve this, dispute resolution clauses within the insurance policies which typically refer disputes to arbitration should be re-considered. Underwriters should also consider drafting clauses to refer disputes to mediation as a first resort. This would certainly augur well for all the stakeholders in the insurance industry.

