# All I want for Christmas is...mediation

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**While litigation is often the right course of action, too much focus is placed on the value of a claim and too little on analysing the likely financial outcome, the attendant risks and the collateral impact on the business. There's also a tendency to reach instinctively for one's litigator without considering whether other options could be more suitable.**

With year-ends approaching, now is a good time for finance both in-house lawyers and accountants to take stock and examine outstanding disputes, particularly where the issues are not clear-cut. Are they worth the time and cost involved, or would it be better getting them off the table before Christmas? And given that 90% of UK commercial mediations settle – and at a fraction of the time and cost that litigation entails – might mediation be the solution?

If a dispute may entail having to make an accounting provision, mediation should enable you to reduce the allocation – or at least significantly reduce the likely settlement range. For SMEs especially, that couldhave a significant positive impact on year-end figures.

Where a claim is material for balance sheet purposes and a provision has already been made, unless you have a firm legal opinion showing reasonable defence prospects mediating may enable you to release that provision.

Conducting a meaningful conflict audit analysis involves estimating both the odds of winning any case and the parties' likely combined litigation costs through to the end of trial. Apart from being high compared to other jurisdictions, these often end up dwarfing the claim. (This also explains why legal proceedings are invariably uneconomical for claims of less than GBP 125,000).

Risk management assessments should be carried out regularly to reflect changing business conditions and even possible alternative litigation funding models. It shouldn't just be restricted to third-party litigation; internal company matters can also be expensive and time-consuming. Issues like HR niggles, or inter-departmental spats, are best nipped in the bud before positions become entrenched and problems escalate.

In the same way as a marriage guidance counsellor may be able to clear the air and help a married couple, hiring an independent mediator can be an effective inexpensive way to help parties resolve their differences. Similarly, where major organisational changes are envisaged, preventative action can repay dividends.

It is not always widely appreciated by the business community, but mediation is a standard step in English court litigation, and around 70% of all High Court commercial cases end up being mediated. Judges encourage it – and can impose costs sanctions for refusals to mediate – and lawyers have to inform clients about ADR. In various US states and European jurisdictions, like Italy, it is often compulsory.

Thanks to a raft of UK government initiatives, all government departments and agencies, newly incorporated charities and public bodies are now required to use ADR wherever possible when dealing with third-party claims and before taking disputes to court. Similar initiatives are also being considered for businesses, local government and employment tribunals.

Perhaps the most interesting new convert to ADR is HMRC. HMRC is also trialing a pilot scheme involving in-house facilitators, which is available to any taxpayer until 30 November 2012. The scheme's findings have yet to be published, but reports claim that HMRC has accepted almost 70% of pilot applications and that the mediations have generally taken place within two months.

Mediating tax disputes – with an independent third party, or an in-house HMRC facilitator – should lead to expedited settlements, reduced legal bills and, above all, certainty; all things that certificate tax deposits cannot provide. Crucially, the parties can also straighten out future tax treatment and transfer pricing issues.

Mediation is worth serious consideration when any of these six factors are important:

**Certainty:** Where you want to buy certainty and avoid the inherent lottery of litigation. In 70% of UK commercial mediations, the parties sign a binding agreement there and then. Certainty grows in significance where the issues at stake, or the amounts involved, affect a company's ability to conduct ongoing business effectively.

**Speed:** Where you need to act quickly. If you suspect that the other side has cash flow issues, for instance, mediating should flush this out and enable you, without wasting further time and expense, to navigate the most meaningful settlement. You could then convert that into a consent order and prevent a liquidator from disputing a proof of debt.

Interestingly, given the recent spate of proceedings instigated by liquidators against account holders, mediation is also an effective way of enabling both parties to resolve their differences and move on.

**Practical, flexible settlement terms:** Where either party would prefer to avoid unwelcome precedents, particularly if third parties may have similar claims. Or where, having settled a provisional amount, a deal can be restructured more effectively or tax efficiently, maybe involving reconfiguring rights, payments, cash flow terms, interest or legal costs contribution.

Also, no ruling can be imposed on the parties, leaving them free to explore options safely without compromising their case, or being restricted to conventional legal remedies.

**Privacy:** Litigation may involve unwelcome disclosures because of banking covenants, stock exchange regulations or due diligence requirements, or because court proceedings are public and media organisations routinely check court lists and files for stories. In contrast, mediation keeps disputes and settlement terms confidential and out of the public eye, which can be important when reputations or relationships are involved.

**International disputes:** Where you would prefer to avoid uncertainties typically associated with overseas litigation. Or, given how businesses from different countries often approach commercial and legal issues from different viewpoints, where someone

who understands the dynamics of international deal-making can smooth over nuances and help bridge any gaps.

**Litigation fatigue and stress:** These are often major factors when parties decide to settle. People frequently underestimate how much time litigation can devour and which, invariably, would be better spent running the business.

Mediation is of course not the panacea to every dispute, but it can be a handy alternative to litigation – both as a way of preventing business disputes from getting out of hand before a relationship goes off kilter, and as a quick cost-effective escape route when they do.

Litigation tends to ignore the individuals involved, and places the focus on who's right, not what's right for you. Mediation brings the key decision-makers back to the table and introduces someone independent who can change the dynamics and get people to concentrate on sorting out what works best for them. And with year-ends approaching, it might even improve the bottom line.

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