



Informing Progress - Shaping the Future

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What's the future of international mediation?

This event, held on 9 June, was hosted by London FOIL and was led by **Michel Kallipetis QC** (a highly experienced international mediator) and **Nigel Wright** (a mediator and arbitrator, dual qualified in the US states of New York and Georgia and as a solicitor in England and Wales).

Preparation for international mediation – Nigel Wright

The speaker's experience was of lawyers tending to prepare badly for international mediation. The problem is the lawyers looking at the case from their perspective only, rather than theirs and the other party's. Most mediations are resolved because the parties recognise what they *need* to achieve and not just what they *want* to achieve.

In preparing cases in the past, a lawyer would present his/her case. When challenged with a point about the other side, they would respond by saying words such as 'they can't prove that' but without then being able to justify that statement. There is then time to cover the point but that is not the case if it arises for the first time in the mediation. It must be possible to back up statements and propositions. This means that the preparation addresses the issues that are likely to arise during the mediation.

Michal Kallipetis made the point that there is a subtle but important difference between an advocate appointed for trial and one appointed for a mediation. In the first case, the client is paying him/her to win the case; and in the second s/he is being paid to settle it. But the preparation for mediation needs to be far more thorough, with an awareness of the other side's case.

There must also be a detailed discussion with the client. What *must* they get out of any settlement (the absolute necessities); what they are not prepared to concede under any circumstances; and

what is their wish list of what they would like to get out of a settlement if possible. Once these are known they should be shared with the mediator. The mediator may then have the opportunity to avoid early conflict between the parties that could set back the whole process, by suggesting solutions to the other side which your client would like, and steering them away from any suggestion which is contrary to your client's wishes.

Showing respect in international mediation – Nigel Wright

Communication is 70% non-verbal. With many international mediations not all of the parties may share a common language, including English. Lawyers sometimes adopt an arrogant, alpha male type approach, and/or use words and phrases from litigation, with which non-English speaking parties from other jurisdictions are not familiar. The parties need to be treated by the lawyers in a way the lawyer would want to be treated: with respect. Body language and what is said are studied carefully, particularly during virtual mediations. Treat other parties with respect, as if you are rude to them, they may not listen to your case or be open about theirs. Having respect for their argument, however weak you may consider that argument to be, may allow you to learn something about their case. Many mediations are successful because something is learned from the other side which affords the opportunity to reassess the client's case. Most mediations reveal something about your case of which you were not previously aware but which comes from the other side. This comes out of listening to what they say; watching for their emotions; and the importance they attach to particular arguments.

Emotions should be kept under control, as allowing them to run away may result in it taking a long time to recover the position. The mediation takes longer when respect is not shown.

The speakers were asked about their experiences of handling this situation over the last 12-18 months when mediations have been virtual.

Michel Kallipetis considers that virtual mediation has been a huge success, in that they seemingly bring the parties into closer contact than if they were in a room together. In his experience, eye contact is just as informative as body language, although more than a couple of people in the same room sharing a single screen does provide a barrier to personal contact. In those circumstances, he asks the parties concerned to provide their own laptops if possible.

Of those surveyed by the speaker's company (**Independent Mediators**), 82% said they would take part in an online mediation, even though they had not done so previously. Of those who had taken part in an online mediation, 96% said that they would do so again. When asked to choose between online and physical mediation, only 54% said they would possibly proceed online.

When the option was for some to attend physically, while some attended online, 42% said they would proceed online and 40% said they possibly would do so. The speaker, however, said that as mediator, he would not be with the physically present parties but would also attend remotely. **Nigel Wright** has one client who says he will never do in person mediations again and that may be the case with many heavyweight commercial type disputes. However, he feels that in personal injury cases, there will probably be a preference to return to in person mediation, where the physical presence of the parties can be important.

There does not seem to be any issue with different time zones, with parties content to be in their home countries.

The question was asked whether online mediations took time pressure off the parties (e.g., they do not need to travel anywhere afterwards) and that could lead to them taking longer. **Nigel Wright's** experience is that online mediations have historically been more successful. During the pandemic parties wanted online mediation because they wanted to resolve the dispute. He conceded that one advantage of in person mediation is the time pressure factor but he sees the future as hybrid, with the parties to any main dispute present and those involved in subsidiary matters attending online. The key here is to keep the remote parties engaged.

Another advantage of online mediations is that they are more efficient and there is no down-time. **Michel Kallipetis** agreed and added that in some cases it enables the lawyers to get on with other work, when they are not engaged in the mediation. In response to a question by a delegate, the speaker agreed that a new issue is 'who in fact is present'? With in-person mediation, it is usually possible to identify who is present in the building but that is not the case when a mediation is conducted online. This has implications for the confidentiality of the process. However the mediation is conducted, trust is still an important issue.

An insurer, with recent experience of virtual international mediation, confirmed that a positive outcome of the process was that a deal had been achieved, which was very important. This followed an unsuccessful face-to-face meeting that had involved extensive travel. However, the mediation had taken five days and this was blamed in part on people being 'comfortable' in their home environments. Another disadvantage had been that with some 20 people on the screen, it was very difficult to read body language. Overall, the delegate was of the view that the traditional market approach, which had favoured face-to-face meetings, will now change to the more efficient use of the virtual process, with all of the savings that achieves. He agreed with the suggestion that climate change issues (the carbon footprint of travel) will also be a factor. One possibility was for the early sessions of the mediation to take place remotely, but with the parties coming together when discussions arrived at the 'nitty-gritty'.

In response to a question, **Michel Kallipetis** confirmed that many international corporations are now building into their contracts a stepped approach to mediation. The first step is a bona fide attempt to negotiate settlement, followed by mediation if necessary. Arbitration and/or without prejudice meetings only come after that. Clauses requiring mediation are enforceable in English law and elsewhere. Many see mediation as the way ahead and the only sensible alternative to expensive litigation.

Nigel Wright also spoke to the value of early neutral evaluative mediation, as a way of parties preparing for full mediation. This process helps to narrow down the issues and/or the parties who need to be involved.

The Singapore Convention

Michel Kallipetis confirmed that this has recently come into force. In the light of this, a delegate asked what the appetite is for mediation in different cultures. The speaker is of the view that as, over recent years, mediation has been studied by law students all over the world, awareness of it has increased significantly as a consequence of the ICC International Mediation Mooting Competition, which started some 16 years ago, and is now replicated in London, Hong Kong and Singapore. It is hoped that this interest will continue when they move into practice. Commercial entities also now see the futility of litigation.

A reinsurer was concerned that some lawyers do not properly brief their clients as to what mediation is and how the process works. **Nigel Wright** observed that by its very nature, reinsurance was perceived as an area where mediation might be more challenging. London reinsurers still consider custom and practice to be at the forefront. Nevertheless, most cases are suitable for mediation. Bilateral negotiation invariably throws up a winner and a loser, whereas with a mediator the parties are more likely to achieve a reasonable result. Whatever a lawyer may think of his case, the client may have a different agenda when reaching an agreement.

The speaker also thought it important to have a mediator who understands the issues and not someone chosen simply because they were a good mediator.

It may be advisable to perform due diligence on a nominated mediator, to ensure that the way in which the mediation proceeds is acceptable and does not hand an advantage to the other party.

A delegate asked what happens if, during a virtual mediation, a key party's technology fails at a key moment? **Michel Kallipetis** was of the view that switching to a smart phone was the obvious answer. Switching or mixing platforms brought problems. A party should be advised to have a back-up system in place. **Nigel Wright** makes sure that as mediator he has all of a party's contact details. Technology has its limitations but as more people have become exposed to it, they have become more understanding of the issues it can throw-up.

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