

Talking Point Asia – "You're on mute!" – top tips for when mediation goes virtual

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Mediation has sometimes been described as a bit like marriage counselling. The mediator, like a counsellor, is there to listen to and facilitate discussions between the two parties in an attempt to identify common ground and areas of compromise.

With global travel restrictions still in place, parties are increasingly exploring the possibility of holding virtual mediations. To a generation now fully accustomed to the dreaded "you're on mute" – we look at how best to handle a virtual mediation in the age of COVID-19.

Mediation – the essentials

Although the structure of a mediation very much depends on the approach taken by the mediator, you will often start off with an opening statement from the mediator explaining their approach to the mediation, followed by a presentation or a number of presentations from each side setting out their positions. Where appropriate, the mediator will intervene by asking questions or getting the parties to engage with each other on a particular issue.

The mediator might then want to speak to each party separately in a "caucus." In these caucus sessions the mediator will usually be more candid, and tell a party where their weaknesses and/or strengths lie, in the hope that it will persuade the parties to re-evaluate their position and move closer to each other.

If there are technical matters, the mediator may wish to speak to the technical people alone – away from all of the business politics. Similarly, the mediator may wish to speak to the commercial decision makers alone if they identify a common business interest that can be leveraged.

The virtual world

A mediation will have many moving parts, more so than a traditional hearing. This means that in a virtual mediation, the person controlling the process, which is usually the mediator, will ideally be familiar with the video conferencing platform used. With or without assistance, they will need to be able to set up breakout rooms effectively and efficiently, and make sure that they are speaking to the right group of people at the right time.

If the mediator is not particularly tech-savvy, you need to think about agreeing with the other side – a person who will act as the administrator or host. This person will have full control of who

speaks when and who speaks to whom, so it is best for that person to be as neutral as possible to avoid disagreement down the line.

Coping with cross-talk

There can be a lot of "cross talk" in a mediation as the parties exchange views with each other. The problem with this is that some video-conferencing platforms will try to figure out who is speaking, and automatically lower the volume of the other participants.

Sometimes this means that legitimate questions are missed, or may cause grievances if the same person is being silenced by the software. It is desirable to avoid a situation that only the party who shouts loudest is heard.

If there are many participants in a virtual mediation, it will be worth setting up a protocol for speaking. For example, if an expert is giving their presentation, all other participants (except for the mediator) should be muted so that the focus is on the person giving their presentation.

The parties, with the assistance of the mediator, can also consider putting in place ground rules for questions. For example, questions should only be asked by using the "raise hand" feature or by asking for permission in the chat box. This will reduce unnecessary interruptions and interference from the other participants. Again, it will be best if the mediator is familiar with this, otherwise the mediator will have to ask the administrator or host to monitor the proceedings.

Screen share

In terms of document production, do not limit yourself to the "share screen" feature of the video-conferencing platform. It is useful to have separate bundles of documents that can be referred to during the course of the mediation. This will allow the participants to review relevant documents on their own screen whilst viewing the presentation or discussions.

Allow enough time

A virtual mediation can in theory be more efficient, but it is always good to allow for some float in the programme to cater for things like connection issues, or participants being muted when they shouldn't be.

It is also helpful to have a member of your information technology team on standby so that the issue can be resolved as quickly as possible. Participants should be aware that even with these measures in place, you can easily lose half an hour a day on technical or administrative issues.

Mediations can be an effective means of resolving disputes. Adapting them to the virtual world means good preparation, understanding of the technical opportunities and limitations, and ample rehearsal.

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