

Mediation in Commercial Disputes

[Nick Coffey]

Hello and welcome to TW Law Talk. I'm Nick Coffey. Looking today at a topic I feel very comfortable around, we're talking about mediation, a process I know well from my own work as a family mediator, but we're stepping out of the family area. Taylor Walton has launched TW Mediate and we're exploring mediation in commercial disputes, which I suspect has many similarities with the kinds of mediations I do day in, day out with in many ways, just as much at stake. I'm joined by Saljuq Haider, partner in the commercial litigation department and Katerina Morgan, a senior associate solicitor in the same team who's recently trained as a mediator. Until now, she's been very much the poacher acting for clients in disputes and she's now stepped into the role of gamekeeper helping parties find resolution outside of the courtroom. Together we'll look at what mediation is, why it matters, and how it can offer businesses a faster, more constructive alternative to litigation. Katerina welcome to your first podcast, Saljuq, welcome to your second or third, you're a past master at this now, aren't you? Katerina, you're pushing against an open door here with this question when we're going to be looking at what mediation is and why it has a value. But let's start at the very beginning. What is mediation?

[Katerina Morgan]

So mediation is a method, an alternative method of dispute resolution. There are multiple ways that you can resolve a dispute and litigation is probably the most well known, but mediation is an alternative way of resolving a dispute and it will involve the parties instructing an independent mediator who will facilitate them to help reach a resolution.

[Nick Coffey]

So why is it different? Because ultimately if you are in court, you sit in a room or rooms with a judge or judges and if you're sitting in mediation, you're sitting in a room with someone or sometimes more than one person. What are the differences between being in that room in a mediation context and that room in a court context?

[Katerina Morgan]

In a court context, you're in an open courtroom and obviously everybody can then see each other. Whereas in mediation, the parties will each have their own private rooms. So if there are two parties to dispute, they will each have their own room and the mediator will have their own room as well. And the mediator will quite literally go back and forth between the two private rooms. They will have private conversations with each of the parties understanding a bit more about their situation and what they're hoping to achieve from it. And within those conversations they will then take information back from one room to the other with the view that they can help them find some middle ground and then eventually reach a settlement.

[Nick Coffey]

It's going to come up a few times today where I'm going to say, well look, this is how it is in family mediation. Is it the same in commercial mediation? Cause I know there are lots of similarities and a few differences, but for me in family mediation we know that people are there voluntarily, they can't be forced to be there. There are a few grey areas, but ultimately they can't be court ordered to be there. The process is fully confidential and it is without prejudice. So whatever they agree, they're not bound to, although obviously there's an element of well you come to that agreement. So it's a good point to move forward with. So no settlements binding until the parties have reached a settlement agreement and they will be required to sign that settlement agreement. So in preemption of the mediation, the parties will sign a mediation agreement in which they agreed to attend the mediation in good faith, firstly with the authority to settle, but with the view that they can therefore reach a settlement in the mediation and it's at the conclusion of the mediation. If there is a settlement agreement and the parties have signed it, then the matter is finalised and that's then the parties walk away and it's all settled. But sometimes that isn't always the case. It doesn't mean that the mediation has failed. Instead it just means that the parties may have reached heads of terms but they still need some time to hash out the particulars or their lawyers are still drafting the settlement agreement. But it is always best practise and in fact encouraged by mediators and lawyers as well that parties do ensure that they record the terms of settlement in writing, particularly if there are litigated proceedings.

You are also a lawyer, you're an experienced litigator and you know your stuff and you are used to advising your clients in mediation or in court as to what comes next. But as a mediator, you are there not to judge, you're there not to be a judge, you're there to facilitate. Is that a tricky line that you fly? Because obviously inside you must kind of know where something should be headed.

[Katerina Morgan]

Yeah, absolutely. So there are two hats here. You are right. I am a litigator and I've done it for many years. I've attended lots of mediations as a litigator and I've advised clients. But of course being a mediator is a completely different skillset. It's approaching it from a completely different angle. And whilst I may have my own views on where we are in terms of legal prospects, I am not there as a lawyer. I'm there as a mediator. So I do have a little bit of an internal struggle for want of a better phrase, but that doesn't necessarily mean that I can't shine through as a litigator, I am very well exposed to dealing with stressful situations, lots of emotions, and they're the type of skill attributes that shine through as a mediator,

[Nick Coffey]

You just have to be careful not to roll your eyes out loud. That's what I've constantly got in my mind is like, did I just give that away? But Saljuq nervous to ask you this question because I'm going to say why mediate? And you're not allowed to say don't because you are a litigator is what you do. You like litigating, but there are very well-founded reasons aren't there for mediating even a very complex case?

[Saljuq Haider]

Absolutely. And although I am a litigator, a loss of my job is advising clients at an early stage that they should engage in some form of a ADR, the most common one, which is alternative dispute resolution. And the most common form being formal mediation. So I will always advise a client from the outset and it's actually in the pre-action protocol for most protocols. Under civil procedure rules, we advise clients that they have to go through some form of without prejudice correspondence or indeed mediation itself. So I'm always advising on those issues. If that fails, we are then head logging into litigation. Now that's not to say that during the course of litigation, and what I mean by that is during a court timetable, there won't be opportunities to settle whether through correspondence. And I have had cases where I've done two mediations, one at the outset and one just prior to trial,

[Nick Coffey]

But that day in court doesn't always go as you think it might and it can be very dependent on a number of factors, maybe even down to what a judge had for breakfast. I don't know. It can be highly unpredictable is one of the key benefits of mediating that your client remains in control of the outcome. So while they're in mediation, they have a say in what happens to their money, their business, whatever it is that they're mediating about, they're not going to have someone say to them, this is the answer.

[Saljuq Haider]

Absolutely. And I always advise clients that when they go into mediation, they should go in with an open mind, but they should have in mind a bottom line figure because in the heat of a mediation, and it can be a stressful situation sometimes as stressful as litigation itself, and you have to have a mindset that I'm not going to go below a certain figure. And that's an important thing that a client needs to go into a mediation with in mind.

[Nick Coffey]

Is there any evidence also around the benefits of a negotiated solution? So Catherine, I often say in mediations I'll say, look, since the age of two, if someone tells me what to do, I'm likely to not do it. But if I feel like I've got some agency in the decision or I'm part of the decision making process, I'm more likely to stick to it. Now I know it's different in your field because obviously the agreements have to then be enshrined in a legal agreement but find or is there anecdotal evidence that where two parties have come to that agreement themselves, they're likely to be, for want of a better word, happier with it than if they're told what to do?

[Katerina Morgan]

Yes. I mean for the most part, some people may end up having settlement regrets, but at the end of the day, you're right. If you've made a decision, a very well-informed decision to reach a settlement, you would've considered the pros and cons. And this is where as litigators, we then give advice on the alternatives because at the end of the day, if you go before a judge that is one person making a determination on that day, it's out of your hands. Yes, there are potential legal recourses and next steps which fall outside of this subject, but you've quite literally left it into the hands of somebody else, an individual.

Whereas with a negotiated settlement, you have got control and there will always need to be some form of a compromise on both parts.

[Saljuq Haider]

And I also advise clients that they're going into a mediation that there is always going to be hurt on both sides and they have to go into a mediation mindful of the fact that they're not going to get entirely what they want, but sometimes that's preferable to go into litigation and it's a flip of a coin.

[Nick Coffey]

And you mentioned that you are advising them. Is it important to state at this point as well that going to mediation doesn't mean stopping having your legal advice? In fact, it is vital to maintain your legal advice through that process.

[Saljuq Haider]

And it depends how technical the dispute is. Of course, I've dealt with multimillion pound disputes which have gone to mediation and they're a very different forum if you like, to a dispute over a defective kitchen. And costs do come into play here because of course in a dispute over 20,000 pounds, you may spend in the region of, I dunno, 5,000 pounds including the mediators fees, that money you're not going to get back gone as part of the assessment. And so it sometimes is a much more difficult mediation to conduct in those circumstances and something that needs to be considered in advance of going into mediation whether it's worthwhile. I sometimes advise clients that we should make an offer on a without prejudice basis prior to mediation saying, look, we're going to spend about 5,000 pounds on mediation, why don't you offer that amount as a nuisance factor settlement now because that won't be repeated in a mediation, a very different situation to a multimillion pound dispute. And I deal primarily with construction disputes and you've got millions of pounds and there's a lot more movement. So spending, for example, a hundred thousand pounds on expert reports for the purposes of a mediation is a worthwhile exercise if it gives you the springboard settlement for a few million pounds as opposed to 30 million pounds.

[Nick Coffey]

And of course Katerina, the point that Saljuq makes there is really important because you may think that, for example, it will be in large easier to mediate a case over a 10,000 pound kitchen compared to a 10 million pound construction dispute. But often the people that you're mediating with over a 10,000 pound kitchen for them, that may be the biggest expense they've made since they bought their house 30 years previously. Where there are fewer funds where there are fewer resources. Those cases can be in many ways more complicated.

[Katerina Morgan]

Yeah, absolutely. I think it's predominantly because it's emotions that are involved. Using your example, Saljuq, a multimillion pound dispute will involve corporates.

[Saljuq Haider]

Yeah, investors.

[Katerina Morgan]

Absolutely. And I think when you are dealing with businesses, you are going to strip a little bit of the emotion, not all of it, but you will strip some emotion out in comparison to dealing with individual disputes. That's not to say that it doesn't work the other way around. You can still have individuals fighting over large sums of money, but you are right Nick, I think the point you're making is that if there's a small pot, there's less of the pie to go around

[Nick Coffey]

And we'll talk about emotions, I want to talk about high conflict and how you mediate when those emotions are running very, very high. But before we do that, let's just spend a couple of minutes on the actual process because you may be listening to this thinking, okay, they are quite likely I did this mediation thing. How does it work? What is going to happen? So you've got a party or two parties who are involved in a dispute. Their lawyer in this case, Saljuq says you should go to mediation. What is that process from start to finish?

[Katerina Morgan]

So, when the parties have agreed that they would like to go ahead and instruct a mediator and they've chosen that mediator, one or both of the parties will be in touch with the mediator. And if I'm that mediator for example, I would have initial conversations with both of the parties to understand a little bit about the situation that they're in, the current status of the litigation, if there is any, and what they're hoping to achieve out of it. There will then be a mediation agreement, which is a formal document that all parties sign to effectively confirm that they're willing to attend the mediation, they're

[Nick Coffey]

Going to play nice

[Katerina Morgan]

Exactly that they go in good faith and that whilst there's no obligation for the parties to settle in mediation, they are there to really work hard and to give it a good go.

[Nick Coffey]

And that's really helpful for the mediator because we can always draw back to that and say, you signed up to this, this is how it's going to work.

[Katerina Morgan]

Exactly. And then that's just logistics of how the mediation will take place. Does it take place virtually or in person if in person where location rooms, et cetera,

[Nick Coffey]

Do you tend to set aside a day

[Katerina Morgan]

In the main? Yes, there can be half day mediations subject to the value and the complexity of the case. From personal experience, it's usually a day's mediation. You can have longer than that, but the problem with having more than one day, sometimes it can involve settlement fatigue or it just gets a bit tiring for the parties. In the most common form, it tends to be one day. So once you've got your day booked and you attend the mediation itself, what literally happens is party A will go into one room, party B will go in the other and the mediator will have their third room, which tends to be a much bigger room.

[Nick Coffey]

The luxury room.

[Katerina Morgan]

The luxury room. The reason that is, is just because it means that if there are any joint meetings between the parties or just their lawyers, there is a neutral space as such for them to have any conversations. And once the mediation started, the parties will be in their own rooms. The mediator will quite literally go back and forth between the two parties discussing the matter,

[Nick Coffey]

Getting your steps in.

[Katerina Morgan]

Absolutely. They would've had the opportunity to have read papers beforehand and what we call position statements or case summaries, explaining where each party is and what they're hoping to achieve. But without making any concessions at that point. And once the mediators have the opportunity to explore a bit further with each of the parties to understand legally, personally, commercially, emotionally where they're all out, it might then roll into the starting of settlement discussions and offers might go back and forth. At that point, that's when the mediation starts to ramp up its pace a little bit because party A will make an offer, party B will make an offer.

[Nick Coffey]

It's exciting.

[Katerina Morgan]

Yeah, it goes back and forth and back and forth hopefully with heads of terms then agreed. And if there are lawyers then present, they will start drafting a settlement agreement with the view that it's then finalised terms agreed and signed at the end of the day. But as I mentioned earlier, that's not always possible. Sometimes you can get heads of terms agreed. Sometimes the party isn't legally represented. So in that situation I would then be suggesting to that non-represented party that they go and take legal advice and that the parties all agree to put a pin in the current settlement discussions to allow them to do that. It just makes it fairer for each of the parties, particularly if somebody doesn't have the benefit of a lawyer. If the mediation doesn't settle on the day, then I will pick up the conversations with the parties the following day to see how they went. Sometimes emotions and decisions change overnight, so it will just then involve making sure that they're all on track to finalise the settlement and that they're working towards that in some way.

[Nick Coffey]

I guess what it's quite hard to imagine is how you as a mediator actually create shifts because you can't advise, you can't tell people what to do, even though you acknowledge yourself sometimes the temptation must be quite high, you can't tell people what to do. You are facilitating a conversation. And for me in the family space, often it's about helping two people move from blame to problem solving and then we kind of start to see those small shifts and we build on those small shifts in the commercial space. What skill sets are you using as a mediator to move people along from what can be disputes that have been entrenched for years?

[Katerina Morgan]

Absolutely. Well, my skillset as a litigator, as I've mentioned before, is very appropriate as a mediator, as a lawyer, I can't tell people what to do either. I can only give them advice, but as a mediator, it's about asking the right questions, posing the right sentences for people to have a think about their situation and perhaps see it from the other side's perspective. At the end of the day, there is no such role that is as privileged as being a mediator. Nobody will ever have the benefit of seeing both sides of the coin completely raw, completely open because it's all without prejudice, it's all confidential. The judge is never going to see that. The judge is only ever going to see what is presented before them.

[Nick Coffey]

And forgive me, the back to basics question, because someone may be listening to who's right at the beginning without prejudice, that means that whatever you discuss in mediation cannot be in effect used against you or held against you or quoted against you.

[Katerina Morgan]

Absolutely. Effectively what is discussed in the mediation is kept within the mediation itself. But that's where, going back to your earlier question, Nick, about the skillset, that's where I then shine as a litigator because yes, I do have, and I may have my own views on the legal position, but at the end of the day, I'm there to help the people find their resolution. It's not

my case at the end of the day, it's not my mediation as such. It's their mediation and I'm there to help them find a solution. So it's all about maintaining calmness, ensuring that I am approachable and I'm able to discuss matters with the parties confidentially. And knowing that I will only take into one room what they authorised me to take because ultimately as a mediator, I'm there to discuss with them and help them reach their solution.

[Nick Coffey]

And let's not forget a really important part, which is that you are human as well. And of course you're bound by impartiality, you're bound by all of the ethics of being mediated, but you are human. And when in your head you're saying, look, this is their case, it's not mine, but that humanity can come out because when you are metaphorically banging heads together, you're saying, look, I'm going to go home today. My life continues. You guys need to sort this out. And it's almost that reality check and that reality test of where they're at, which can be really powerful.

[Katerina Morgan]

Absolutely. I think the phrase that's always used is, this is your day, this is your mediation and this is your future. And it goes back to the point we mentioned earlier about having the power to decide what that looks like and how that looks like in the future. These people have come to the decision to instruct a mediator because they want to find a solution and it's about working hard in order to get to that solution.

[Nick Coffey]

Do you ever find it difficult, I'm kind of addressing this to both of you. Do you ever find it difficult when you're dealing with people who are, so I'm going to use the term institutionalised. By that I mean if they've been in a process, legal process, lawyers, litigators, perhaps they've already been to court and they've become so, I dunno if institutionalised the right word, but so part of the system that then dialling that back and bringing it back to basics can be really, really challenging because some people really like being part of that system and really like being in litigation.

[Saljuq Haider]

I think it comes down to personalities and being realistic about what your key objectives are. And I suppose one of the downsides to mediation is that there is no guaranteed outcome, whereas many of my clients want a guaranteed outcome. They want finality and you can have mediations, which there is a high proportion of commercial disputes that settle with mediation. I think it's in the upper 90 percentile that is high. And so all the more reason why parties should attempt it. But if that fails, you've got no outcome and you are having to spend the cost of going through litigation anyway. So that is for me, one of the downsides, and don't get me wrong, I am a fan of mediation, but both Katerina and I will be assertive in our approach on litigation if it fails.

[Katerina Morgan]

That's not necessary to mean that because you've had a failed mediation once, it would mean you have a failed mediation again.

[Saljuq Haider]

As I said earlier, I have been involved in a number of cases over the years where we've had a mediation at the pre-action stage in order to kill off the case quite quickly. It hasn't settled that stage. So we've had to go through the litigation process, issue proceedings, go all the way through disclosure, witness statements, and then had a further mediation and it settled. And I suppose mentioning the disclosure point is another downside I would say to mediation, because of course there is no formal obligations that you have in the litigation process under civil procedure rules to disclose documents to the other side.

[Nick Coffey]

But that day will come if it fails in mediation, the day is going to come anyway.

[Saljuq Haider]

It will do. And it depends if you're at a small claims stage that the disclosure obligations are slightly more toned down if you like, as opposed to a multi-track trial where you have fairly stringent requirements for disclosure. But in a mediation forum, apart from the parties voluntarily disclosing documents, they could be holding key documents back and there's nothing you can do to force them to disclose.

[Katerina Morgan]

No, you're absolutely right. That could come out in the conversations in the mediation using your earlier example if it were to take place pre-action. But you're right, it's up until there's a legal obligation to disclose documents, people can keep back what they want to. But that's not to say that a party couldn't necessarily force another party's hands to have a mediation on a compulsory basis. So what I'm talking about here, Nick, is that the civil procedural rules, which govern litigation in this country were amended in 2024 to allow the courts to order compulsory mediation. And that came off the back of a case called Churchill in 2023. Prior to all of that, it was encouraged by the courts that mediation or a DR should take place, whereas now the parties can be ordered by the courts of mediation to take place.

[Saljuq Haider]

Can I just clarify, is that for small claims or is it for any level of...

[Katerina Morgan]

So, for small claims, that will invariably be an obligation for mediation to take place, and that's a sort of judicial mediation which is done through the courts, but the compulsory mediation can be ordered at any level of court, at any value of the claim itself. So following the amendments of the CPR, there was a case that involved a well-known brand where the parties attended a pretrial review, which is the final hearing before trial. And one of the parties made an application to the court for a compulsory mediation to take place. The court ordered it and the parties settles at the mediation. So yes, I do agree that having a

mediation at some point in the litigation can have an impact on the settlement itself. But it goes back to the point about the mediation agreement, about the parties attending mediation in good faith that they're there to try and resolve the dispute, but that's not necessarily the case for every single case itself.

[Nick Coffey]

And before we come to the end, I just want to look also at the misconceptions around mediation, the myths around mediation. I remember once I was chatting to someone who was considering or had been told to consider mediation and this person said, mediation is woke. Now, I never fully understood what they meant by it, but I think what they meant was is it a bit touchy feely? Is it not quite as powerful as caught? Is it all a little bit 2025 won't surprise you to know that. My view is that that was absolutely rubbish, but is there not a bit of a misconception around mediation that it's a little bit, it's a little bit light?

[Katerina Morgan]

Yes, there is. I think people will always consider a ADR as a failure because they haven't had their day in court or they want their day in court. But I wouldn't underestimate how serious and intense the mediation process is. It's a very tiring day and there is a lot of hard work to be put into that.

[Nick Coffey]

Tough questions,

[Katerina Morgan]

Absolutely tough questions, A lot of self-reflection. It's not easy, but I think people also need to understand that going to court is not easy either. It's very stressful, very nerve wracking being before a judge with a sensible authority

[Nick Coffey]

And expensive,

[Katerina Morgan]

Very expensive.

[Nick Coffey]

Two more myths. Mediation is a sign of weakness,

[Katerina Morgan]

Not the case at all. I think those parties who can actually agree to set aside a day or two or whatever it's necessary to get a settlement are probably stronger than those who just try to shy away and go ahead with the litigation

[Nick Coffey]

Final one. We are way too high conflict for mediation. Mediation cannot help us because this is too entrenched. We are too volatile, too hostile. We need a judge.

[Katerina Morgan]

That's exactly the type of case suitable for mediation. They're going to be the perfect examples of people who need to have a mediator

[Nick Coffey]

To deescalate,

[Katerina Morgan]

To deescalate, absolutely to reality tests, to show them the other side of the perspective as well. They are the perfect examples of why you should mediate.

[Nick Coffey]

And perhaps just tapping into that thing, the woke point, there is a serious element there, which is that mediation I think gives you more of a chance to be heard. If you're in court, obviously the judge's role is to hear you, but with mediation you've got a little bit more scope to give your side of the story and to literally be heard. And sometimes being heard, or at least feeling that you've been listened to, can go a long way to resolving a dispute.

[Katerina Morgan]

Absolutely. I can guarantee you this, you will be heard far more in a mediation than you would be heard in a court, particularly if you're being cross examined

[Nick Coffey]

And whisper it very, very quietly. But mediators quite high conflict cases because they are challenging and because actually serious hat on the sense of achievement for everybody. If something has been very, very complex and rife with hostility, it's a really nice feeling to get to the end of that.

[Katerina Morgan]

Absolutely. And at the end of the day when people have a conflict, for the most part, people don't like having a conflict and it's not going to go on indefinitely. So the best suggestion is to try and have control over how that is concluded.

[Nick Coffey]

Let's finish on TW Mediate and perhaps also look at the future of commercial mediation. TW Mediate is now launched. What are you looking to achieve with it and how does that align with the direction of travel of mediation in the commercial space?

[Katerina Morgan]

So, mediation and the commercial space is definitely up and running. The changes to the CPR and the recent case law with compulsory mediation is putting mediation on the forefront of everyone's periphery, really both litigators and non-litigation. The intention of TW Mediate is to help parties resolve their disputes. Being a local mediator to the home counties is where I'll be able to shine because I'm local and it means people don't need to necessarily travel into London.

[Nick Coffey]

And there's something kind of reassuring there, Saljuq as well, because that shows that as a firm you are open to ADR, you are not there just to litigate. You understand the benefits of mediation when it could work.

[Saljuq Haider]

Yes. And mediation has always been an option for parties. We have advised parties on mediation for many years. I think that the change of tide though has come from the civil procedural and recent case law that Katerina has mentioned. That is making it vastly more important to go towards mediation first before going down the litigation route. And one of the reasons for that is that there are cost sanctions for parties who unreasonably refuse to mediate.

[Nick Coffey]

Is that recent because in family law that only goes back a year to 2024 that those sanctions, has that always been the case or no?

[Saljuq Haider]

It has always been the case, but what has happened is that parties have just paid lip service to mediation as a box ticking exercise. Now the courts are stamping down on that much more

[Nick Coffey]

And asking whether you really did do it

[Saljuq Haider]

Precisely.

[Nick Coffe]

I think I'm allowed to be biased as a mediator about mediation and the summary of everything that you've said to ka Katrina and indeed yourself Saljuq is that mediation can be less stressful, it can be cheaper, it can be more time and cost effective. It can be a really, really positive way of resolving even the most entrenched disputes.

[Katerina Morgan]

Absolutely.

[Nick Coffe]

So TW Mediate, where do we find it?

[Katerina Morgan]

It's on the website. We have a dedicated page just set up for mediation. Taylorwalton.co.uk And on there it's more information about how mediation works along with our prices.

[Nick Coffe]

It's been really interesting to chat to you. Good luck with the, it's not quite a change of career, but the slight shift of career. I'm sure you'll still enjoy the litigation part of your work, but being able to marry the experience as a litigator into that mediation field, I think brings a really incredible skillset to those people that you're going to end up mediating, Taylor walton.co uk as Katerina was saying there, for more information about TW Mediate, if you are yourselves caught in a very complex, stressful, difficult litigation process, suffice it to say that hopefully this podcast has shown you that mediation can be a really, really effective way forward. This is now our second series of TW Law Talk. Don't forget that you can listen to any of the previous episodes either on Spotify or Apple or on the Taylor Walton website. And while you're at it, if you're on Spotify or Apple, do click on follow so that you get notified of all future episodes. For now for me, Nick Coffe and Katerina and Saljuq, it's goodbye.