When the Mediator is Transformed into the Arbitrator

By Renee Gerstman

Parties who leave a mediation having reached agreement generally do not anticipate further action on the part of the mediator. This assumption about the mediator’s future involvement in the matter may not be correct. Indeed, the language used by the parties in the Memorandum of Settlement may have the effect of expanding the role of mediator to that of arbitrator.

It is not uncommon in more complex matters for the Memorandum of Settlement to provide that a formal settlement agreement incorporating the agreements reached and documented in the memorandum will be drafted and negotiated by the parties after the mediation has concluded. Anticipating disputes over the language of the settlement agreement, the parties may provide that any disputes regarding the language and terms of the settlement agreement are to be submitted to the mediator for resolution and incorporate a brief sentence to that effect. But what exactly have the parties agreed the mediator is to do in the event of a dispute over the language or terms of the settlement agreement? It is unclear whether the parties have agreed 1) to allow the mediator to continue as mediator under the terms in the mediation agreement, or 2) that the mediator shall change roles and act as the final arbiter of the terms and language of the settlement agreement, or 3) that the mediator can issue a final award on the merits in the matter.

At least one court has held that language authorizing the mediator to decide disputes over the terms of the settlement agreement constitutes an agreement to submit the matter to the mediator, now acting as arbitrator, for a final and binding award. In Eastwick v. Cate Street Capital, Inc. 2017 ME 206, 171 A.3d 1152 (2017), the parties could not agree on the scope and language of the release provisions and the final terms to be included in the settlement agreement. The memorandum provided that “any disputes that may arise during the drafting and execution of the settlement shall be submitted to [the mediator] for review and resolution.” In accordance with this provision, the parties reconvened with the mediator to address their dispute over the terms of the settlement agreement. Prior to that meeting, Eastwick’s counsel sent a proposed order with findings of fact and conclusions of law. At the meeting, the parties discussed their differences regarding the terms of the settlement agreement. After the meeting, the mediator-as-arbitrator signed Eastwick’s proposed order over Cate Street’s objection. The proposed order contained a provision that it was enforceable as an arbitration award.

Eastwick submitted the order signed by the mediator-as-arbitrator to the trial court for confirmation as an arbitration award and issuance of judgment thereon. Cate Street contended that it had only authorized the mediator to facilitate negotiation of the final terms and language of the settlement agreement and did not agree to the mediator acting as arbitrator and entering a final and binding award.

The trial court rejected Cate Street’s arguments that the arbitrator exceeded his authority and confirmed the award and entered judgment thereon. The Maine Supreme Judicial Court affirmed the trial court and held that by incorporating language stating that “any disputes that may arise during the drafting and execution of the settlement shall be submitted to [the
“mediator for review and resolution,” the parties granted the mediator authority to resolve any disputes in drafting and execution of the settlement agreement as arbitrator and enter a final and binding award. The court, focusing on the specific language of the memorandum, noted that it resolved the parties’ dispute such that the only issues remaining were disputes that arose in the drafting or execution of a final settlement agreement, and that the purpose of the memorandum was to bring finality to the dispute. The lesson from the Eastwick decision is that parties and counsel should pay careful attention to any language in the Memorandum of Settlement that addresses the mediator’s role in resolving disputes involving the drafting or execution of the settlement agreement. Vague language authorizing the mediator to resolve any such disputes may grant the mediator broader authority than intended, including the ability to render a final and binding award that can be confirmed in a court of competent jurisdiction, not just a decision on the language to be incorporated into the settlement agreement.

Having the mediator become the final arbiter of the terms of the settlement agreement can be advantageous. It eliminates gamesmanship in drafting and negotiating the settlement agreement and saves the costs and fees of going to court to enforce a settlement. On the other hand, parties should consider whether information revealed or positions asserted during the mediation might cause the mediator to be less than impartial, and render it inappropriate for the mediator to later serve as arbitrator. Assuming the parties agree that the mediator should be the final arbiter of the language of the settlement agreement, the parties should at a minimum: (i) specify the limits of the mediator’s authority as arbitrator; (ii) set forth the process to be used by the arbitrator in making that determination, e.g. baseball arbitration or an evidentiary hearing; (iii) state whether the arbitrator has the authority to issue an award on the claims asserted in the underlying dispute that is confirmable in court; or (iv) whether the mediator’s role as arbitrator is limited to determining what language and provisions are to be included in the final settlement agreement and ordering the parties to execute a specific settlement agreement.

Neutrals should give thought to whether, under the circumstances, they can fairly transition to the role of arbitrator. In accepting this new responsibility, neutrals should also confirm their prior disclosures and make any additional disclosures that may be necessary. If the mediator is called upon to act as arbitrator concerning the terms and language of the settlement agreement, they should clarify with the parties the extent of the authority granted and make sure that the process for rendering such a decision provides a fair opportunity for each party to present their positions.

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