

Promoting the Economic and Other Benefits of Transactional Mediation, An Under-Researched and Under-Utilised Process

Theory-of-Change Symposium

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[Barney Jordaan](#) believes that businesses are missing great opportunities to improve their deal-making and that our field should promote transactional mediation to help them gain the benefits that this process can offer. He is professor of management practice at Vlerick Business School in Belgium, and has been active in the ADR field for more than 30 years. He firmly believes, perhaps a little naively, that with the right mindset, leadership, and sometimes a little help from peacemakers in business and politics, organisations and societies are capable of profound positive change.

The idea of using mediation to help parties conclude deals is not new. This is variously referred to as “transactional mediation,” “deal mediation,” or “assisted deal-making.” In his seminal 1982 work, *The Art and Science of Negotiation*, Howard Raiffa suggested the use of the process in the context of mergers and acquisitions. In *The Global Negotiator*, Jeswald Salacuse (2003) refers to a “counsellor to the transaction” in a major international merger deal. In his 2017 book, *Negotiation*, Michael Leathes, after highlighting the typical excuses among in-house legal counsel for *not* using third parties in deal making, provides a detailed description of the advantages and workings of the process.

To date, the most thorough and extensive academic treatment of the topic is that of Scott Peppet’s 2004 article, *Contract Formation in Imperfect Markets: Should We Use Mediators in Deals?* Since then, nothing of real substance has been written about transactional mediation in academic journals.

Nevertheless, a Google search reveals that the process is being promoted by a variety of organisations and service providers as the next big thing in mediation (see, e.g. [Deal Mediation](#) and [Deal Mediation in Corporate and Commercial Disputes](#)). Hager and Pritchard described the application of the process in international deal-making.

“Deal Mediation” is a new, potentially powerful tool for lawyers who negotiate global deals and for others who seek wise and fair agreements in complex environments.

Some enlightened mediators and parties have realized the value of using mediators to cut deals and this absolutely natural application of mediation is likely to gain traction among those wise enough to realise that they can negotiate more effectively if a neutral person is engaged to manage the process on the parties’ collective behalf.

If deal mediation can, as we postulate, reduce the risk of stalemate in negotiations, anticipate conflict, forestall disputes and hence lead the parties to sounder contract arrangements, there is good reason to recognize and promote a new legal specialist the deal mediator.

Yet there is no evidence of transactional mediation being used on a major scale in business negotiations.

The Benefits of Transactional Mediation

The key difference between transactional and dispute mediation is the emphasis of the former on problem avoidance and prevention. To what extent can the use of a mediator result in better deals in negotiations of franchise, licensing, joint ventures, mergers and acquisitions, or infrastructure project agreements? In other words, would mediation promote deals that are concluded efficiently from a time and cost perspective, add economic value to the parties, and minimise disputes and implementation failure?

Might the use of an impartial mediator have helped, for example, the likes of Renault/Nissan and Fiat/Chrysler, or Bayer and Monsanto with the mergers they were reportedly keen on completing? Could mediation have stopped them early on from investing more time and other resources in deals that were dead from the beginning? And what about the Brexit negotiations? Might the involvement of experienced mediators at an early stage of the negotiations have helped to avoid the current stalemate and the resulting political and economic fall-out?

Qualified and experienced transactional mediators can assist deal-making in several ways. They can, for example:

- Assess early on if a deal is possible
- Help parties search for value-creating options
- Manage relational, psychological, and emotional barriers to agreement
- Assist parties in their planning and preparation
- Keep parties focused on the merits while leaving management of the people and process dimensions to the mediator
- Manage deadlock
- Create a perception of fairness through the use of objective criteria or standards to decide between options
- Improve decision-making
- Overcome information asymmetries
- Optimise outcomes
- Mitigate strategic posturing by the parties or their representatives
- Assist in implementation of agreements

In a nutshell, transactional mediation can reduce transaction costs, enhance deal value, and prevent or resolve disputes that might arise early on. The potential broader knock-on effect for the broader economy, although difficult to quantify, should not be underestimated.

Obstacles

Despite these potential benefits, transactional mediation appears to suffer from the same problems as dispute mediation. While the potential benefits of the process – at least from the perspective of the converted – are readily apparent, the uptake seems to remain limited. There has been little introspection within the mediation community about the reasons for the slow growth of transactional mediation in most jurisdictions despite the high volume of Google entries singing the praises of mediation in general.

Talking with mediation colleagues, I am often left with the impression that the blame is being shifted to the users of dispute resolution or deal making services for being blind to the obvious benefits of what mediators can do for them. We ask ourselves, “Why don’t they get it?” Seldom do we ask, however, “Well, why should they? What’s in it for them? What might be the risks of embracing the process for them?”

Without trying to be exhaustive, here are possible reasons for transactional mediation not “taking off” as predicted:

- Unawareness of the process and its benefits
- Perception in the marketplace that mediation is a process that is confined to the resolution of disputes
- Habit and over-confidence, i.e., deal makers are accustomed to doing it themselves and believe they can do it best
- Preference for “old style” positional bargaining or unawareness of the potential of a mutual-gains approach
- Mediator self-interest, i.e., pricing the service out of the market
- Fear that suggestion of the process could come across as weak or be construed as an admission of inability to do the deal themselves
- Concern that the involvement of a mediator might make advisors and representatives appear incompetent
- Additional costs of involving third party
- Regulatory problems or uncertainties about the legal status of a mediator involved in the deal-making process (e.g., whether they have to register as brokers or transaction advisors, and whether confidentiality protections would apply)
- Impact of what Professor Frank Sanders called “the deadening drag of stuff quoism” (as quoted by Leathes)

What Could Be Done to Increase the Use of Transactional Mediation?

I believe there are three promising ways to increase the use of transactional mediation. These are influencing the deal-making culture in organisations and among deal makers, creating awareness, and marketing the process.

Influencing the Deal-Making Culture

One option is to include transactional mediation as a component in relevant teaching and training programmes at the university and business school level. Another is to make it part of professional continuing education programmes for deal-makers and their advisors.

Creating Awareness

There are several ways to promote awareness of how transactional mediation works and its potential benefits. Mediation trainers can include it in their training programs. Planners of educational workshops can sponsor programs for deal-makers in organisations and deal-making firms, banks, and other financial institutions. These programs can be provided for employees of businesses and their advisors. Local and international bar and business associations can sponsor educational programs about it.

Marketing the Process

Our field should develop a convincing message that promotes the benefits of the process and addresses deal-makers' specific concerns. This should be addressed both to the deal-makers themselves and those acting in an advisory capacity. Transactional mediation and the role of deal-makers (and their advisors) should be shown to be complementary. The transactional mediator should not be situated as an alternative to deal-makers or advisors but as someone who eases the work of the negotiators. Mediators should be "counsel to the deal" and not counsel to the parties. Candid messages should not only discuss how the involvement of a third party might help deal-makers but also how it might hinder the process.

If the market for transactional mediation improves, deal-makers would need a steady supply of well-trained transactional mediators. Their services should be worth their fees.

References

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