



## The role of the Forensic Accountant in Mediation

Many commercial disputes are the subject of complex litigation, however a number of these disputes are being resolved through mediation and other forms of Alternative Dispute Resolution (ADR). The Mediation Act 2017 came into force on 1 January 2018, which requires parties to consider mediation in the context of litigation. The mediator has no role in deciding the outcome of the issues in dispute, however a skilled and experienced mediator will facilitate a process where the parties in dispute are able to arrive at an agreed settlement.

In 2013, the Centre for Effective Dispute Resolution in Ireland in association with the Irish Commercial Mediation Association (<http://www.icma.ie>) published the results of a survey entitled "CEDR Ireland / ICMA Mediation Audit" which addressed the attitudes of civil and commercial mediators and commercial lawyers to mediation, amongst other things. One of the key findings of the survey was that, of the responses received, the average settlement rate for mediators in 2012 was 66%. This would suggest that in a majority of cases, mediation is a very suitable forum in which to resolve disputes. In litigation, forensic accountants are often engaged by either party to act as expert witnesses to provide an independent assessment of the damages being claimed and to provide expert evidence either by way of expert testimony or by submitting an expert's report. In mediation, a forensic accountant has a number of possible roles to play, which are discussed below.

### Expert Accountant acting as a Mediator

Accountants may play a role in a dispute by acting as a mediator. For example, disputes involving business valuations, application of technical accounting standards or which require business acumen and experience in a particular industry or sector may benefit from having a mediator with the requisite expertise in these areas.

### The Forensic Accountant's role in calculating damages and attending the Mediation

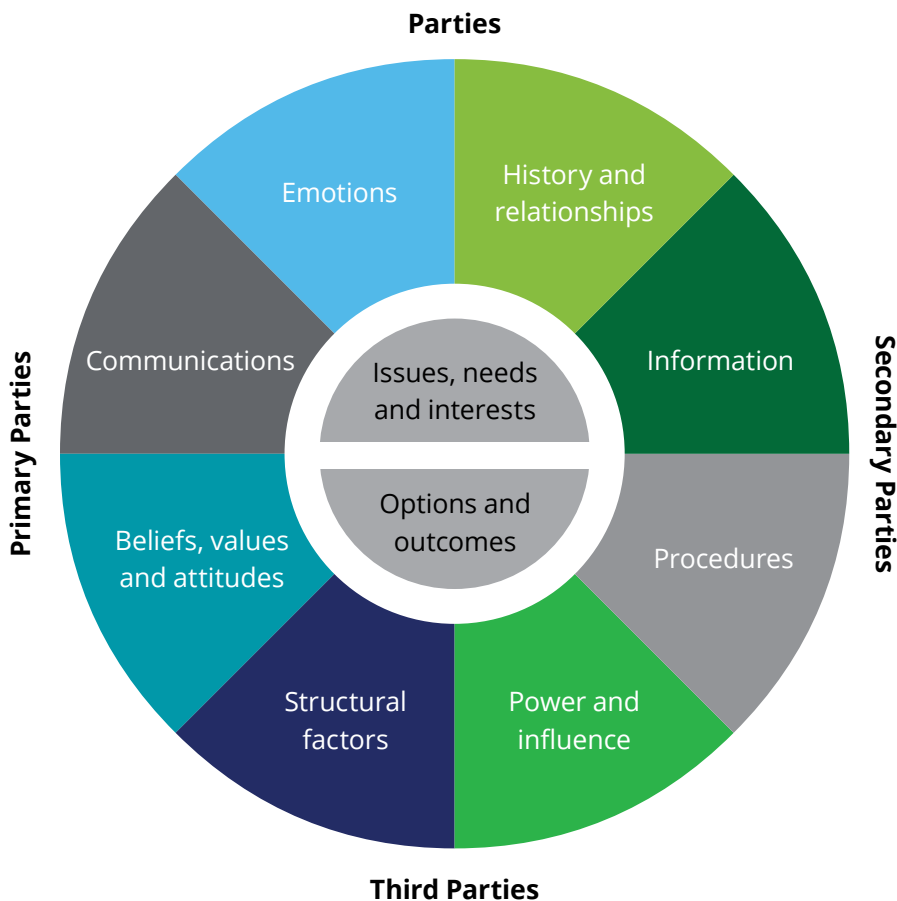
In complex commercial disputes requiring an expert opinion on the quantum of damages, for example in a case whereby one party may have suffered a loss of profits following a breach of contract by another party, a forensic accountant may be retained as an independent expert to provide an independent assessment of the amount in dispute. In such a case the forensic accountant may be requested to prepare an expert report, attend a meeting of experts with an opposing expert, or advise their client on a range of their potential losses depending on a number of factors or assumptions. In mediation, the forensic accountant can provide a similar role, assisting a mediator in dealing with and understanding complex financial issues.

### Benefits of appointing an independent forensic accountant in a Mediation

Christopher W. Moore, in his text entitled "The Mediation Process"<sup>1</sup>, addresses the use of Experts in Mediation by reference

to the Circle of Conflict (see diagram below). Moore describes Experts as “individuals, groups, organisations, or other entities that have, can obtain, and provide information that a party or all parties believe will be of value in addressing and settling their differences”.

Figure 1: Circle of Conflict: Causes of Dispute and Opportunities for Collaboration (Christopher W. Moore)



Commercial disputes such as breach of contract, product liability claims or business interruption claims following a flood or a fire, often involve complex accounting issues that may include several data conflicts including:

- calculation of the cost of goods sold;
- identification and classification of fixed and variable costs;
- allocation of overheads e.g. to a manufacturing process;
- foreign currency and interest rate swap calculations;
- discounting future losses (e.g. by applying a weighted average cost of capital);
- calculation of wasted management time; and
- taxation.

A forensic accountant’s role in a mediation would include the identification of all of the different heads of loss, and calculation of same. In acting as a data provider or data arbiter in a Mediation the forensic accountant is able to reduce the data conflicts which often prevent the parties from arriving at an agreed position.

### The Mediation process

In a mediation, both the parties and the mediator may benefit from the forensic accountant attending the mediation to present his or her findings to the mediator in the presence of the parties, or independently of the parties who are involved in the dispute.

In Mediation, a forensic accountant may be appointed in the role of a third party as a “data provider”, described by Moore as someone who is “independent, neutral and impartial in their relationship to the parties, issues in dispute, and the data they provide”. The forensic accountant may also have a role as a “data arbiter”, i.e. an expert that may be retained by one or more disputing parties to answer factual questions about which the parties disagree and that they believe will be relevant to resolving the dispute.

Often in a mediation, the period of loss, i.e. the period in which losses will continue to be suffered by one party arising from the alleged actions of another party is an area of dispute. A forensic accountant must be able, during the course of a mediation, to adjust their calculation of losses arising for different scenarios that may emerge and that may not have been considered by either party prior to the mediation. Being able to provide information to the mediator or the parties as to the effect of resolving differences in areas such as the loss period, or volume of lost sales, and the knock on effect of doing so on the overall quantum of loss, is often invaluable to the mediator and to the parties as a successful mediation progresses towards a resolution.

1. Moore, Christopher W. The Mediation Process: Practical Strategies for Resolving Conflict (4). Somerset, US: Jossey-Bass, 2014.

# Contacts

Having access to an independent forensic accountant during the mediation process means that the mediator and the parties involved have access to an individual with:

- specialist industry expertise (if needed);
- the ability to bring and maintain an impartial view of the matters in dispute prior to and during the course of the mediation;
- in-depth investigative and analytical skills;
- the ability to quickly perform complex calculations under a number of different scenarios;
- the ability to present their findings in a succinct manner; and
- the ability to adapt during the course of a mediation to new evidence or new arguments presented during the mediation by either party, and to quickly adjust any calculations to take account of new information or scenarios that may emerge and which could lead to a successful resolution.

## Future developments of Mediation in Ireland

It is hoped that the use of mediation and other forms of Alternative Dispute Resolution will continue on an upward trend into the future to resolve complex commercial disputes.

## For more information please contact:



### David Carson

Partner, Forensic  
dcarson@deloitte.ie  
+353 1 417 2513



### Barry Robinson

Director, Forensic  
barobinson@deloitte.ie  
+353 1 417 8998

Dublin  
Deloitte & Touche House  
Earlsfort Terrace  
Dublin 2  
T: +353 1 417 2200  
F: +353 1 417 2300

Cork  
No.6 Lapp's Quay  
Cork  
T: +353 21 490 7000  
F: +353 21 490 7001

Limerick  
Deloitte & Touche House  
Charlotte Quay  
Limerick  
T: +353 61 435500  
F: +353 61 418310

Galway  
Galway Financial Services Centre  
Moneenageisha Road  
Galway  
T: +353 91 706000  
F: +353 91 706099

Belfast  
19 Bedford Street  
Belfast BT2 7EJ  
Northern Ireland  
T: +44 (0)28 9032 2861  
F: +44 (0)28 9023 4786

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