Using Mediation Techniques to Improve M&A Outcomes

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This article has evolved from an initial discussion at the International Bar Association (IBA) Annual Conference in Singapore in October 2007 where I spoke about my rather mixed experience of using a third party to assist in the negotiation of major deals. For the Fordham Conference I have been able to take this a little further and concentrate on some aspects to which I was only able to allude briefly in Singapore.

I must make clear, however, that these are my personal musings and do not reflect the opinions of past employers or colleagues or current or past clients.

There is frequent complaint that mergers and acquisitions (M&A) often fails to deliver the promised value to shareholders and may at times even be value destroying. This article seeks to explore whether the use of mediators or perhaps mediation techniques could improve the outcome in some cases and specifically may reduce the number of “bad” deals that go through. By a “bad” deal I mean one that really should never have been allowed to proceed, as it had no reasonable chance of producing the anticipated returns.

By way of example, consider the case of a family company being sold to a multinational. The multinational has a small establishment in that country, and the acquisition of this local company is intended to provide the critical mass necessary to support further development. The sellers are second generation and inherited in middle age, by which time they had established their own businesses in other sectors and so had had limited expertise or interest in running the target company whose sales were slumping as a result. There was considerable distrust among the sellers, and they were not all prepared to meet together in one room.

The multinational had carried out some due diligence and had uncovered nothing but bad news. They had been hampered in completing their work, as some of the key papers were in the hands of the tax authorities and others were under review by State prosecutors. Standing on the sidelines in the cold light of day, one’s first reaction is, of course, that the multinational should run as fast as possible in the other direction. But was that what happened? Of course not!
We have all been there: it is two in the morning, management has been working on the deal for months, outside counsel has produced files full of reports, finance is already including projections in the budget, and the draft contracts are in their umpteenth iteration; you turn to your client as yet another unhelpful fact emerges, and noting that it does not look very good, enquire if the client really wishes to continue.

The client pauses for perhaps a nanosecond before responding that “the fundamentals are still there,” and with the various discounts, warranties, and other safeguards so brilliantly negotiated, it is still worth it. It is like a kind of “sales fever” where everyone ignores the fact that no matter how much that orange nylon dress is reduced, it will still never be wearable.

So, why would the multinational go ahead? In part, I think it is that the deal takes on a life of its own:

- The negotiating manager may fear loss of face or even career damage if he or she “fails” to deliver the deal;
- Having been given responsibility the negotiating manager may be reluctant to appear weak or to lack seniority by asking for advice or help;
- The macho culture works against timeouts or even deferment to the next day with negotiations now traditionally going on into the early hours—negotiation by exhaustion!; and
- So much work and expense has already been devoted to the project, it has become in effect, inevitable.

Could the use of mediation techniques lead to a different outcome? Generally, discussions about the use of mediation in deal making have revolved around using mediators to break a negotiation impasse, to facilitate discussion of ancillary matters such as staff benefits, or to resolve disputes along the way where a complex deal involves the implementation of interrelated contracts over a period of time.

Rather than readdress the pros and cons of such use, I would like to examine other ways in which mediation skills could contribute positively to the M&A process. The process can be divided into the following stages:

- identification of target;
- instruction of counsel;
- indicative offer;
- due diligence;
- negotiation; and
- implementation.

In recent years, an enormous amount of effort has gone into improving and refining techniques for due diligence and implementation. While