



When to Mediate

This is the third in our series of **ADR practical guides**, designed to provide clients with essential guidance on various processes falling under the banner of "alternative dispute resolution" (ADR), with a particular focus on mediation. This guide sets out factors and questions to consider when identifying suitable opportunities to mediate in the lifecycle of a dispute.

Introduction

Although there is sometimes discussion about the "right" time to mediate, in reality mediation can be undertaken effectively at a number of stages in the lifecycle of most disputes. However, different dynamics will be at play at different stages. Parties should tailor their expectations, preparation and negotiation strategy accordingly.

In general, the earlier a mediation takes place, the earlier the opportunity to reach a resolution, control costs and benefit from the other advantages of the process such as the saving of management time, managing reputational issues and preserving business relationships. Equally, the earlier a mediation takes place, the less information the parties will usually have to enable them to come to an informed decision about settlement. This tension is best addressed by focussing on what information is truly necessary to enable the relevant decision-makers to act with reasonable prudence, and how that information can be provided most efficiently, either through or in parallel with the litigation process.

This guide sets out factors and questions to consider when considering when a mediation might be effective and whether the parties have enough information to proceed. It is important to recognise that mediations can be "successful" even if the entirety of a dispute cannot be resolved. Consequently, this is a discussion about "when" not "if" to mediate.

For more information on mediation generally, see our **ADR practical guide No. 2: "Mediation – what it is and how it works"** available [here](#).

Factors influencing the decision-making process

Agreed dispute resolution process

- Are there applicable contractual provisions that mandate ADR? If so, at what stage? These will have to be observed if they are effective and enforceable.

Civil Procedure Rules and court process

- Pre-action Protocols and the Practice Direction on Pre-Action Conduct require early and serious consideration of negotiation or some form of ADR before proceedings are issued.
- The overriding objective includes promotion of ADR by the court.
- The court's general case management powers now expressly

include ordering parties to use ADR. The court is likely to propose a window within which ADR should be attempted when making procedural directions. The court can also stay proceedings to allow the parties to engage in ADR.

- Failure to comply with an order to mediate, or an unreasonable refusal to mediate, can have adverse costs consequences.

Extent of knowledge and understanding about the case

- Is there sufficient clarity on:
 - the issues in dispute;
 - quantum; and
 - the relative merits of the parties' cases

to enable the parties to be clear about what dispute(s) they are trying to resolve, and to enable a meaningful risk assessment to be carried out? Bear in mind that the mediation process will itself assist the parties to develop this understanding.

Whether mediation has a realistic prospect of success

- "Success" may not necessarily mean a final and binding settlement. Any of the following may be worthwhile outcomes:
 - Clarifying the factual and legal issues in dispute, their importance and the merits of the parties' positions.
 - Narrowing the issues by eliminating or resolving those issues that it would be unnecessary or disproportionately costly to litigate.
 - Exploring the underlying interests and motives of the parties.
 - Focusing the attention of key decision-makers on the dispute and the range of possible outcomes.
- How may the attitudes of decision-makers affect the prospects of a successful mediation?
 - How entrenched are they in their positions?
 - Are they reconciled to a compromised outcome?
 - Are there particular personal or emotional issues, or cultural expectations, at play?
 - Are they motivated by a desire for public vindication or another aim that is only achievable through a court judgment?

Costs

- What are the likely overall costs if the matter proceeds to the end of trial?
- What proportion of these costs might not be recoverable for a successful claimant awarded its costs on the standard basis?
- What will be the most expensive stages of the litigation process, how much will they cost and when will they happen (relevant both for cash flow and liability)?
- What is the potential overall costs liability of an unsuccessful defendant subject to an adverse costs order?

Procedural milestones

Pre-action

- If pre-action protocols have been complied with and relevant documents produced by pre-action or third party disclosure, there may be enough information to have a meaningful mediation.
- What is the attitude of the parties? Are positions too entrenched for there to be a realistic prospect of a mediation succeeding? Or is there a continuing commercial relationship that could be better preserved by an early settlement?
- Would the parties benefit from early "reality-testing" of their positions by a mediator?
- If mediation is not attempted, would issuing proceedings advance the parties' understanding of the evidence, facts or law and make a settlement more likely thereafter?
- Is there a compelling reason to issue proceedings without mediating first? For example:
 - Imminent expiry of a limitation period
 - A need for interim relief, such as an injunction

Prior to/at the first Case Management Conference

- Has an understanding of the facts or assessment of the prospects of success changed since statements of case were filed and served?
- If mediation is not attempted now, will proceeding with disclosure make a subsequent mediation more likely to be successful? Will either party actually find a "smoking gun"? Is an increased chance of success justified by the costs of disclosure?
- Are there specific categories of documents that might assist a mediation? If so, can the parties agree on a staged disclosure exercise aimed at prioritising these?

After substantial completion of disclosure

- Has the understanding of the facts or assessment of the prospects changed now that disclosure has taken place, or will factual/expert witnesses have important information to add which could alter the assessment?

After factual/witness evidence

- After the exchange of witness statements and (if relevant) expert reports, there should be no reason why mediation should not be productive.

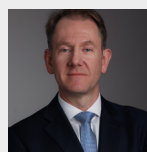
During trial/post-trial

- The risks inherent in the trial, including the performance of witnesses, mean that the parties will undertake a re-appraisal of the case as the trial proceeds. In long trials there may still be opportunities to resolve the matter through mediation.
- While most of the costs of the action will have been incurred by the end of the trial, even then there may be commercial or reputational factors that make a settlement preferable to a court judgment.
- Commercial interests can also change. The parties should continue to consider whether there are outcomes that are not obtainable by a judgment alone which might be preferable and which remain in their control.

If a party is unwilling to mediate, a party proposing mediation should ensure it has given thought to appropriate costs protection mechanisms (eg a Part 36 offer or a "Calderbank" offer expressed to be "without prejudice save as to costs") and has pressed the unwilling party to articulate its reasons for refusal. If no reasons, or inadequate reasons, are provided, this is likely to be relevant to costs submissions at the conclusion of the case. As noted above, the court can also order the parties to engage in ADR and should be asked to do so if a party is otherwise reluctant to engage.

See also our [ADR practical guide No. 5: "Preparing for mediation"](#), available [here](#) for guidance on approaching preparation for a mediation, whether at an early stage or later in the litigation process.

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