Preparing for mediation

This is the fifth in our series of **ADR practical guides**, designed to provide clients with practical guidance on various processes falling under the banner of "alternative dispute resolution" (ADR), with a particular focus on mediation.

This guide highlights issues that parties preparing for mediation should consider in order to maximise the effectiveness of the process.

A mediation often represents the best opportunity the parties have before trial to resolve their dispute. Effective preparation greatly improves the prospects of achieving a settlement.

Keep in mind the following key points as part of the preparation process:

- How to remove **obstacles to settlement** in advance. Parties should do all they can to avoid negotiation at the mediation being delayed or failing because an issue that could have been identified and addressed ahead of time was not dealt with.
- What does the **other side** need to help them resolve the dispute? Parties tend to focus only on their own case and preparation. However, a resolution will only be achieved with the agreement of both sides.

Pre-mediation preparation

The more complex the dispute, the more value there will be in preparing early. It is important to address the following areas:

- Who will attend the mediation with authority to settle? Will there be sufficient parity of decision makers in terms of status? Are there third parties with an interest in the outcome (eg insurers or funders) who need to be kept updated?
- What information will the parties need in order to reach a resolution? For example, are there technical issues that require specific input?
- How will quantum be addressed? The focus of the parties is often on liability, but a resolution will usually require information on quantum, frequently before the parties have addressed the issue in detail in litigation or arbitration.
- Where will the mediation take place? In practice there is usually little difference between the mediation taking place on so-called "neutral" territory or in the offices of one of the party's legal representatives, provided appropriate space and facilities are available.
- How are the costs of the mediation to be borne? These will include the parties' legal costs of preparing for and attending the mediation and the parties' respective shares of the mediator's fees (and any venue fees).
- Would a pre-meeting before the mediation be helpful, with or without the mediator to assist?

If one or more parties resists engaging on these topics, enlist the mediator's assistance to propose and lead a discussion. This can save money and avoid frustration and delay at the mediation itself.

Understand the mediator's style and approach

Once the mediator has been selected, seek to gain an understanding of their style and approach, as this may have a significant bearing on how the mediation progresses. Most experienced mediators can adapt their style to suit the parties, so engage in discussion with the mediator, usually in advance, on what is likely to be helpful and why.

While the mediator may, from the papers or personal style, be inclined to focus on certain issues (eg commercial, technical or legal), the parties own the mediation process. They should therefore actively express their views so that they can be taken into account by the mediator.

Undertake a risk assessment

It is essential to carry out a risk assessment that covers the following:

- a critical analysis of the respective merits of the parties' legal and factual positions
- gathering sufficient information on quantum issues
- consideration of the underlying commercial or other interests of the parties and how those interests may impact on the negotiation strategy of each party
- an analysis of the costs of the litigation (incurred to date and likely to be incurred in future), including identifying the likely irrecoverable element of costs

Develop a negotiation strategy

While it will not be possible to predict every move in the negotiation, and it is important to be flexible on the day of the mediation, it will be helpful to consider the following:

- the level of initial offers and how they relate to the issues in dispute
- the merits of making the first offer
- anticipated counter-offers

- commercial bargaining positions of the parties
- non-financial elements of any offers (such as apologies, public statements, confidentiality undertakings, future joint ventures/ relations)
- range of desirable and acceptable potential settlements
- economic or reputational issues in the event that a settlement is not achieved

The strategy should also take into account the personalities and potential personal involvement of the individuals who will be attending and representing each party at the mediation.

In addition, it is sensible to explore cost effective ways in which a settlement might be structured. For example, if there are tax efficient ways of structuring a settlement, it may be necessary to seek tax advice prior to the mediation and have contact details for a tax adviser available on the day.

Attendance at the mediation

All attendees need to understand the process and their roles so that they can play their part effectively.

- Ensure that there is someone in attendance on both sides with the necessary authority to settle the dispute.
- It may be helpful to have other members of senior management present in order to signal that the mediation is being taken seriously. In general, attendees should be at a comparable level of seniority.
- The more extensive the role that commercial representatives and decision makers can take the better. Ensure that they are prepared in advance and understand the issues and the implications of taking positions on the day.
- Consider including individuals who are able to assist with particular technical or other factual matters that form a substantive part of the dispute – but make sure the mediation does not turn into a rehearsal of a trial, and that these attendees understand that they are there to assist the negotiation, not to take over the process.
- If key individuals are unable to attend, make sure they are contactable during the mediation, including out of hours.

Preparing the position statement

The primary purpose of the position statement is to explain the dispute to the opposing decision maker(s) and persuade them why they should seek to resolve it. It is a valuable opportunity to speak directly to the decision makers, rather than their legal representatives.

Since decision makers are frequently commercial rather than legal representatives, position statements resembling skeleton arguments for trial and containing detailed submissions on the law are unlikely to be effective. Effective position statements typically tell a narrative of the dispute, help the other party to see the dispute in a different way (or at least understand that there are different ways of viewing the issues) and explain the risks if the dispute continues.

If there are particular additional matters that a party wishes to explain privately to the mediator, these can be addressed in private conversations or by way of an additional, separate confidential position statement which is prepared for the mediator's eyes only.

Preparing for the opening statement, private sessions and beyond

If the mediation commences with a joint (or plenary) session, an opening statement presents an opportunity for each party's representative to present the case from their own perspective.

It is important for an opening statement to communicate the key messages clearly and effectively. It may be necessary to address difficult issues head on, but inflammatory language is unhelpful. Consider whether visual aids or other presentational tools (such as images, diagrams, presentations or a short film) may assist, especially where the dispute concerns technical issues.

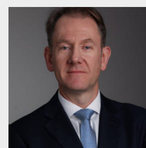
Ideally, an opening statement should be made by the principal commercial representative, supported as necessary by their in house or external legal advisers. It will be necessary to prepare for this ahead of time, with a script or talking points. Rehearse the opening session in advance if time permits.

Attendees should prepare for potential confrontation, aggression or emotion on the part of the counter-party and anticipate how best to deal with it. Understand the importance of listening attentively to the other party without interruption. The mediation process rests on each party respecting the other party's position.

After the plenary session the mediator may (and often does) spend time with the parties in private sessions engaging in shuttle diplomacy. But as negotiations progress it is common for mediators to propose that the principal commercial representatives on each side meet without their lawyers. Since these discussions are often the critical points in the negotiation, ensure that commercial representatives are prepared in advance (so far as possible) for such situations. When the mediator proposes such a meeting, the parties should take a few moments to collect their thoughts and prepare.

If the mediation does not achieve a settlement on the day itself, it is worthwhile for the commercial representatives to stay in contact with their counterparts. Often progress made at the mediation, and the lines of communication that have been opened up, provide opportunities for further discussion and negotiation in the following weeks or months. This can often lead to settlement.

KEY CONTACTS



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