INTRODUCTION TO MEDIATION – WHAT IT IS AND HOW IT WORKS

This is the second 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). This guide provides a high-level introduction to mediation.

WHAT IS MEDIATION?

Mediation is a confidential process in which an independent and neutral third party (the mediator) is appointed by the parties to help them reach a negotiated settlement of their dispute, principally through structured settlement discussions. The process can be conducted before the commencement of formal litigation or arbitration proceedings or alongside such proceedings.

The mediator does not act as a judge and has no power to make binding decisions. Rather, the mediator explores options for settlement with the parties and attempts to broker a deal.

The goal of mediation is to reach a settlement that ends the dispute on terms that are acceptable to both parties, not to determine the parties' legal rights or arrive at the "correct" legal position.

WHAT ARE THE ADVANTAGES OF MEDIATION?

- **Speed** – most mediations last one day and can be organised within weeks
- **Flexibility and informality** – the extent to which lawyers are involved (if at all) is up to the parties. It is often the case that the more direct communication between the parties at the mediation, the more effective the mediation
- **Cost savings** in both legal expenses and management time
- **Confidentiality** – nothing said or done in the mediation can be relied upon in subsequent litigation or arbitration except in limited circumstances. The same is true of without prejudice documents created for the purpose of the mediation
- Better chances of **preserving business relationships** due to the conciliatory nature of the process
- Greater **range of potential outcomes** – with scope for non-monetary remedies such as the provision of services, payments in kind and apologies. This contrasts with the more limited range of outcomes in litigation/arbitration, unlike court orders which are limited to particular legal remedies.

WHAT IS THE MEDIATOR'S ROLE?

The mediator controls the process and encourages open and honest communication between the parties. They have no powers eg to make an order for the production of documents or to make a final determination. The parties remain in charge of the outcome and must reach an agreement between themselves and sign a written settlement agreement in order to be bound. Until such agreement is reached, the parties are free to walk away from the mediation.

The style of mediators can vary from "facilitators" (who assist the parties in their negotiations) to "evaluators" (who encourage settlement by expressing views on the merits and likely outcomes).

WHEN TO MEDIATE?

The "right" time to mediate will depend on the circumstances of the case. The key is having sufficient information to make sensible decisions about possible settlement options. In many cases, this will be after the exchange of initial correspondence and documents about the dispute. For some larger cases, it may tactically be better to wait until there has been more substantial disclosure of documents.

Generally speaking, the earlier a dispute is mediated, the greater the savings in legal costs and management time. An early successful mediation will also have a greater chance of preserving reputations and ongoing relationships. However, mediation may be less productive if attempted too early, particularly if a lack of information prevents the parties assessing the merits of the case in a meaningful way. For more on timing issues, see our **ADR practical guide No. 3: "When to mediate in the dispute cycle"**. available here.

WHAT TYPES OF CASES CAN BE MEDIATED?

Mediation is suitable for most types of disputes. Historically cases involving allegations of fraud were thought to be more difficult to mediate due to the nature of the allegations, but in practice many such disputes are mediated successfully.

In certain cases, it may be desirable to set a precedent to assist the parties in their future dealings, in which case a binding court judgment may be needed. If a swift interim remedy is needed, such as an injunction to prevent certain behaviour (eg the dissipation of assets), mediation would also not be appropriate, at least until the interim remedy has been obtained.

HOW TO PROPOSE MEDIATION?

It used to be considered a sign of weakness to suggest mediation. However, many businesses are now familiar with the process and willing to test its benefits.

The English courts have long encouraged parties to engage in ADR before and during litigation. They now have the power to require parties to do so, as well as to impose cost sanctions on parties who

unreasonably refuse. Other court systems take a similar approach. Many large organisations also have policies that require them to consider and/or use mediation in appropriate cases. Sometimes the contract in dispute between the parties may even require it. These factors can be used as a basis for suggesting mediation – as well as all the advantages of the process noted above.

HOW IS A MEDIATOR APPOINTED?

If a proposal to mediate is accepted, the parties must then agree the appointment of a mediator. In most jurisdictions, this can be done either:

- through an ADR/mediation service provider; or
- through the parties agreeing to appoint and instruct an independent mediator.

Mediator fees vary but in large commercial disputes mediation costs are usually insignificant compared to the parties' other costs and the sums in dispute.

For a discussion of factors to consider when choosing a mediator, see **our ADR practical guide No.4: "Appointing a mediator and drafting the mediation agreement"** available here.

WHAT HAPPENS ON THE DAY?

Before the mediation

Once the parties have agreed to mediate, they will enter into a mediation agreement which sets out the procedural framework for the process: when, where, who attends, authority to settle, confidentiality and costs. See our **ADR practical guide No.4: "Appointing a mediator and drafting the mediation agreement"** available here.

The parties will usually exchange short position papers before the mediation setting out their respective cases. It is also usual for the parties to agree a core bundle of documents for use at the mediation.

The mediator will generally want to speak to the parties or their advisers before the mediation day. The purpose of the discussion is to ensure that the mediator has a sufficient understanding of the case and the main points of contention. For an overview of matters the parties should consider prior to mediation, see our **ADR practical guide No.5: "Preparing for mediation"** available here.

At the mediation

Mediations can last from a few hours to several days depending on the complexity of the dispute. Most commercial mediations last one or two days. The process is flexible. However, the following format is often adopted:

Opening session

- The mediator starts the day with informal introductions in the parties' private rooms.
- The mediator will then ordinarily hold a joint meeting involving all parties. At this session, the mediator will establish ground rules for the day, reaffirming the confidentiality of the mediation and asking each party to respect the other's right to be heard during opening presentations.
- The mediator will usually ask each party to make a brief opening statement to present the key issues. This can be made by the lawyer or business principals, or a combination of the two.
- This opening session may be the only time during the day when all parties are together in one room. Formal courtroom advocacy is rarely effective – this is an occasion for business negotiation.

Private meetings

- The mediator will then conduct a series of private meetings (sometimes called caucuses) with each party, seeking to learn more about their expectations and to test the strengths and weaknesses of each party's case. Nothing said in these meetings is passed to the other party without specific authority for the mediator to do this.
- The mediator's first private session(s) are generally aimed at getting a better understanding of the issues that separate the parties and their underlying interests.
- In the course of the day, the mediator will encourage the parties to move towards making offers and counter-offers. The approach will be informed by what has been learned during the day. Depending on the case, there may be scope to explore non-monetary solutions as well as a financial resolution.
- It is often through this process of private meetings (known as "shuttle diplomacy") that the mediator brings the parties towards settlement.

Further joint meetings

- It is quite common at some point in the mediation – typically later in the process – for the mediator to encourage the business principals to engage in direct discussions without their legal advisers.

Settlement

- If a settlement is reached, the lawyers present will draw up a settlement agreement. If no lawyers are present, the mediator may help with the drafting.
- The agreement only becomes a binding document once it is signed by all of the parties.

No settlement

- If no settlement is reached, the parties retain the ability to pursue their rights either through litigation or arbitration as appropriate.
- The mediator will generally ask permission to stay in contact with the parties, as often settlement can be reached in the following weeks or months.

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