



Selecting a Mediator and Drafting the Mediation Agreement

This is the fourth 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.

Mediator selection

The mediator plays a critical role in the process. While in some cases the parties (or their advisors) will have a specific mediator in mind or be content to engage a mediator proposed by one of the commercial ADR providers, the exercise of identifying suitable candidates is often more complex. Consider speaking to potential mediators privately and on a general level about a possible appointment to gain an understanding of their approach and their personal style, as this can have an important influence on the process. A mediator will be careful to avoid expressing any views on a matter on which they are not formally appointed.

If the parties favour a more formal process, consider inviting potential mediators for an interview or "beauty parade" so that each party can ask questions and a shortlist can be drawn up.

Most commercial mediations are arranged on an ad hoc basis, without the administrative assistance of an ADR provider. While this approach has its advantages, it can be harder to obtain feedback on mediator performance. When identifying possible candidates, consult a range of sources such as personal recommendations and internet search tools.

Practical experience and accreditation

In many jurisdictions there are no formal requirements to be a mediator, whether in terms of initial training or ongoing professional requirements. Consider the following:

- It is generally preferable for a mediator to have been trained by a reputable organisation to ensure that they understand the process to international standards (recognising that mediation varies in style across jurisdictions). It is important that mediators have a solid understanding of how confidentiality operates, particularly in private sessions, and a proper understanding of the process.
- Ask about the mediator's practical experience. While you will want to ensure that the mediator you select has sufficient practical experience, consider using less experienced mediators for lower value or more straightforward mediations to build the pool of experienced mediators for the future.
- Consider asking for references in order to get insights into the mediator's strengths, weaknesses and approach.

Subject matter knowledge

There are differing views on whether it is important for a mediator to have expertise in the subject matter of the dispute. In reaching a decision on this issue, consider the following:

- Does the dispute genuinely concern specific industry or sector practice, meaning that specialist knowledge is necessary for the mediator to participate credibly? The fact that an organisation operates in a particular sector does not necessarily make the dispute "specialist" to that sector. Businesses routinely have commercial disputes which have little to do with the sector in which they operate. It is unlikely that specialist knowledge is truly necessary for a mediator to assist in such disputes.
- If the dispute genuinely concerns industry or sector specific matters, how much specialist knowledge or experience does the mediator actually need? While an understanding of the nuances of the sector may be helpful, the more stringent the requirements, the smaller the pool of suitable mediators with the relevant expertise. It may be that the mediator simply needs enough industry or sector knowledge to "speak the same language" as the parties and not disrupt the process by requiring explanations of basic terminology.
- A mediator's skills in listening, questioning and negotiation are likely to be more important than subject matter knowledge.

Lawyer or non-lawyer?

While most mediators are legally qualified, non-lawyer mediators can offer different skills.

Most disputes arise against the background of a legal relationship, with legal proceedings either in prospect or already underway. It may be more comfortable for the parties to engage with a mediator who is familiar with the terminology and process of formal legal dispute resolution. However, many mediators are trained to avoid making assessments of the legal merits of the case. Legal training may not therefore be essential. Non-lawyer mediators may have other experience which is beneficial, such as a broader commercial perspective. A non-lawyer mediator requires sufficient familiarity with formal dispute resolution to be credible, but in practice that can be easily acquired.

If the issues in dispute are likely to require the mediator to engage in debate over complex legal concepts, a lack of a legal training will be a disadvantage. But many disputes are about more than contractual or other legal relations and bring into play a range of economic and other interests.

Mediator’s style

Mediators have a range of styles. These are best viewed as a continuum, with pure facilitators at one end and evaluators at the other. A **facilitative** mediator assists parties to structure their negotiation and will be reluctant to express a view on the strength of a party's case or propose a possible settlement. An **evaluator** is more likely to express views on both facts and law and make proposals for settlement.

Many mediators are able to use different styles at the request of the parties or adapt to suit the negotiation as it progresses. But since most mediators will favour a particular style by training or personality, consider what will work best for the dispute at issue.

Co-mediators and assistant mediators

Where there are a number of parties, or where the mediation is likely to be complex, consider using more than one mediator to manage the process. Where two or (very rarely) more mediators play full roles in the process, they are referred to as co-mediators. This should be distinguished from assistant mediators, whose role is to assist the lead mediator.

Co-mediators may be particularly helpful in technical disputes where a mediator with subject matter expertise might be combined with a mediator with particularly good facilitation and process management skills.

Although selecting more than one mediator increases costs, the additional fees are usually modest compared to the legal costs of the parties in preparing for and attending the mediation and certainly compared to the costs of litigation or arbitration. The key is that the co-mediators work well together, and the parties understand how their roles and responsibilities are divided.

Mediation agreement

The mediation agreement is the contract between the parties and the mediator and provides the procedural framework and rules for the mediation.

It is common to sign the mediation agreement either just prior to or at the mediation. However, where the parties are engaging with the mediator significantly in advance of the mediation, it is good practice to sign the agreement as soon as the terms are agreed.

Mediation agreements are usually fairly similar in form, whether the mediation is being conducted through a commercial mediation provider or on an ad hoc basis. Below are the most commonly occurring clauses and factors to consider when drafting or negotiating them.

Scope

- The scope of the issues to be addressed in the mediation should be clearly set out in the body of the mediation agreement or in an appendix. To the extent possible, ensure that the description is non-contentious and uses neutral language. If court or arbitration proceedings have already been commenced, it is common to refer to any claim number.
- If there are additional issues or claims not currently raised in proceedings which are to be within the scope of the mediation, these should be expressly referenced. Similarly, identify any issues to be carved out.

Parties and practicalities

- Identify the parties clearly. It is common to identify named representatives of the parties to act as lead negotiators and/or to be vested with authority to settle.
- Set out the date, time and place of the mediation.
- Consider express provisions for the exchange of written case summaries and documents (eg as to maximum length and timings) so that there is sufficient time to prepare.

Authority to settle

- The most successful mediations are those where the party representatives in attendance have full authority to settle the dispute on the day. Aim to have strong drafting to this effect.
- Try to avoid any proposal that the representative with authority to settle will be the party’s lawyer, as there will usually be restrictions on their authority and they may not have the flexibility to deal with unexpected issues.
- Some entities, such as public bodies, may require a settlement that has been agreed in principle to be ratified formally. Identify such situations in advance so that the mediation can proceed effectively and the parties understand the limitations.

Confidentiality

- Confidentiality is critical to the success of the mediation process. While the confidentiality of the process will be implied under English law, even absent an express agreement, clear drafting is always preferable. Ensure that the agreement provides for the mediation to be conducted on a "without prejudice" basis, with everything said in the mediation and every written document produced for the purposes of the mediation to be kept confidential, but also consider appropriate carve-outs. Disputes resolved prior to proceedings may still be subject to reporting requirements to regulators or the market.
- Mediation agreements usually include express language confirming that no party will require the mediator to give evidence or produce their papers in connection with the mediation in any current or future proceedings or satellite litigation, unless each party and the mediator consent. (Although note that, regardless of the parties' position, the English court still has a discretion to compel a mediator to give evidence where it is in the interests of justice to do so).

Mediator liability

- It is standard for mediation agreements to provide that the mediator will not have any liability to the parties in connection with the mediation, usually subject to an exception for wilful misconduct or bad faith.

Settlement

- Mediation agreements commonly provide that no settlement is legally binding until it is agreed in writing. This provision reduces the likelihood of satellite litigation about whether a settlement was reached, and if so on what terms.

Costs

- In most mediations, the parties will split the costs equally (including the mediator’s fees and any venue costs). In some circumstances, one party may be prepared to pay all the costs of the other party.
- Distinguish between the immediate payment of costs (ie how the mediator’s fees are to be paid) and ultimate responsibility for such costs in the dispute. It may be that the parties agree that any costs paid in connection with the mediation will be borne by the parties as they are incurred, but it is also possible to agree that, if the dispute does not settle and proceeds to trial, the costs will be determined in those proceedings. Such an agreement should be recorded in the mediation agreement.

Governing law and jurisdiction

- Remember to include a governing law and jurisdiction clause, particularly where the mediation involves parties from different jurisdictions. England is a mediation-friendly jurisdiction and a popular choice of governing law and jurisdiction. The laws of other jurisdictions may take different approaches to important issues such as confidentiality.

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