

mediation and ADR

Alternative Dispute Resolution, or "ADR", is a way of resolving a dispute without recourse to litigation or arbitration. ADR has developed significantly in the past 10 years, in particular mediation. This is due in part to the efforts of bodies such as the Centre for Effective Dispute Resolution (CEDR) and ADR Group who seek to heighten awareness of ADR, and the civil justice system itself, which incorporates mediation into the judicial process.

The Civil Procedure Rules encourage mediation at an early stage in the litigation process both as a means of resolving disputes efficiently and to ensure that court resources are allocated to those cases which are unable to be settled in this way.

If you are involved in a contentious matter which involves the need to

issue proceedings, after the statements of case are served the court will offer you the opportunity of a stay of proceedings to facilitate mediation. The commercial court has been known to order the parties to try mediation. A failure to accept an offer to mediate without good reason may mean that a party risks being penalised in costs by the court, irrespective of whether the case is eventually lost or won.

Litigation and mediation are not mutually exclusive methods of resolving a dispute. At any stage of litigation the parties may seek to mediate, having obtained such information as they need through the litigation process. The nature of your claim may warrant that an approach be made to the other side to mediate even before proceedings are issued, or you may receive such an offer to

mediate or resolve your dispute by some other form of ADR. Should you accept, and what are the advantages or disadvantages in doing so? This note explains the various forms of ADR that are generally available. Organisations such as CEDR have seen a significant increase in the number of commercial disputes being resolved by mediation. One of four cases reaching the courts are now referred to mediation. As mediation is the most popular form of ADR we concentrate on that process, setting out the structure of a mediation session and how to approach it. Nicholson Graham & Jones has been involved in several high-profile mediations and we have drawn on our experience to set out those factors which we have found to be important.

forms of adr

There are a number of methods which have become popular.

- **Conciliation.** Used mostly in the employment field, this process uses an independent third party to encourage negotiations between disputing parties.
- **Executive Tribunal.** This is a voluntary procedure allowing both parties to a dispute to present their case before senior representatives or executives from each party, together with a neutral chairman who may be a mediator or an expert. Thereafter, the tribunal meets to negotiate settlement on a

realistic basis. It is sometimes referred to as the "mini trial".

- **Early Neutral Evaluation.** A neutral person is instructed by both sides to evaluate the dispute and offer an opinion. The opinion will be a non-binding view of the merits of each side's case, which is used to advance settlement negotiations.
- **Adjudication / Expert Determination.** Submissions are made to a chosen expert in the field for a decision, which binds both parties. This is commonly used in the construction field, adjudication clauses now being compulsory in construction

contracts. Under the Housing Grants, Construction and Regeneration Act 1996, parties to a construction contract entered into after 1 May 1998 may submit a dispute to an adjudicator who can make a quick decision which is binding on the parties until overturned by a court or arbitrator.

- **Mediation.** This is a voluntary, private and non-binding process in which a neutral person (the mediator) assists the parties to reach a negotiated settlement. The mediator's role is more pro active than that of a conciliator but a mediator does not have power to make any decision or award.

structure of a mediation session

A mediation does not involve a series of ad hoc negotiations. It is a structured process. Notwithstanding the best efforts of solicitors acting on behalf of disputants in an adversarial system, they never have the opportunity to evaluate the problem in the same way as a third party neutral.

The mediator will control the negotiations by a series of meetings with the parties both jointly and individually, at his discretion.

- **Case summaries.** These are prepared by each party and are sent to the mediator before the mediation. He may also make contact with the parties' solicitors for clarification so that he is fully aware of the issues.
- **Opening Session.** The mediation will begin with an open session with both parties present. The mediator gives an introductory talk explaining the process and his role. The parties then have an opportunity to make a statement presenting the main elements of their case. This opening statement may be made by one of the parties to the dispute or his/her solicitor.
- **Shuttle Diplomacy.** The parties retire to separate rooms and are seen by the mediator in a series of private meetings with a view to clarifying the issues and identifying options for settlement.
- **Private Meetings.** All meetings held in private with a mediator are entirely confidential. No information is passed on without the specific consent of the party providing it.
- **Joint Sessions.** From time to time the mediator may bring the parties together if appropriate, either to expedite negotiations and allow the parties to deal directly with each other or to finalise a possible settlement.

benefits of mediation

- **Control.** Resolving a dispute in this way means that parties always control the outcome. A mediator cannot impose a decision on the disputants unless and until agreement is reached and signed off at the conclusion of the mediation.
- **Management Tool.** Being informal, flexible and providing the possibility of an early resolution, mediation is much more suitable in situations where the parties want to preserve a commercial relationship.
- **Flexibility.** A mediation can be set up quickly and in any location of the parties' choosing. Discussions need not only relate to the matters in dispute, but can encompass any aspect of the business relationship between the parties. This gives room for more settlement options and is wider ranging than resolution of

the dispute in a litigious sense, where a judicial tribunal can only make reference to the issues before the court. A mediator is able to recognise and promote common interests beyond the immediate issues of the dispute, to the mutual advantage of the parties. It thereby preserves commercial relationships and business confidentiality.

- **Confidentiality.** The mediation agreement generally provides that the process is confidential and discussions are conducted on a without prejudice basis. Conversely, litigation can often attract unwelcome publicity.

In short, a mediator can help craft a settlement based on principled negotiations using multiple options and objective criteria, avoiding any previous history of distrust or positional bargaining.

how mediation differs from negotiation

- A mediator is a facilitator and helps the parties to communicate, side-stepping any problems due to lack of trust.
- The process is educative. Experience shows that the parties to a mediation will, at a very minimum, come away with a greater understanding of their opponent's case even if they do not reach a settlement.
- A mediator ensures that settlement proposals are realistic

and expressed in acceptable terms, thereby avoiding brinkmanship and unnecessary adversarial positioning.

- The mediator can engage in "reality testing", asking tough questions of each side to discover their strengths and weaknesses, having had the benefit of argument from both sides. For this reason negotiations are generally more focused during a mediation session.

preparing for mediation

Mediation does not involve any cross-examination or presentation of evidence, so preparation is less time consuming and expensive. However, each party needs to have a clear idea of what it wants to achieve during the course of the mediation.

- ✓ Gather all the information that you need, including all expert evidence, and counsel's opinions. Make sure you have full authority to settle.
- ✓ Make sure all the facts of the case are known and all the witnesses have been seen, and assess how well they will perform in giving evidence.
- ✓ Make a list of the strengths and weaknesses of your case.
- ✓ Identify any legal issues and obtain such analysis as you need before the mediation.

- ✓ Send the mediator a sufficient amount of information in advance so that he is clear on the issues. Arrange to meet with the mediator beforehand if you think it



- necessary.
- ✓ Work out your tactics. Consider what information you will not want to disclose to the other side.
- ✓ Set out a list of the difficult questions that you may want the mediator to ask the other side.
- ✓ How can you use the mediator to your advantage? He can be a devil's advocate, a problem solver

or a source of new ideas and approaches.

- ✓ Prepare an evaluation of the best possible outcome of a trial, as compared to the worst possible outcome. This will help you to be realistic about what you want to achieve. Just as importantly, you will need to decide how you can persuade the other side that you are being realistic.
- ✓ Prepare your opening statement with these matters in mind. Often it may be beneficial for the client to have an active participation in the mediation and to make the opening statement. It may be the first opportunity that the parties have to meet face to face. Getting to know the personalities involved is part of the educative process and may be useful if the mediation fails to achieve a settlement on the day.

are there any disadvantages in mediation?

There may be. Not all cases are suitable for mediation. For example, mediation is not suitable:-

- Where there are no substantial issues in dispute, such as a straightforward debt claim where the debtor may have no genuine interest in settlement.
- Where a party wishes to obtain a legal precedent.
- Where one of the parties seeks to obtain publicity.

- Where a protective court order is required.
- Where one of the parties is seeking to apply leverage.

We can help you assess what type of claim is suitable for mediation and what is not. Some parties may use mediation to delay the issue of proceedings and buy time. Others may seek to obtain information during the course of a mediation without any real desire to settle. For the most part we would recommend that solicitors are present during a mediation so as to avoid any such potential pitfalls.

costs of mediation

The mediator's fees are generally charged on a sliding scale depending on the sum in dispute. For claims up to £1 million, the mediation charges are approximately £1,800 per day which includes the mediator's preparation time. For more complex claims however, mediators tend to charge an hourly rate which can be anything between £250-400. There are no fixed rules, but generally these fees are shared equally between the parties.

how to get the best out of mediation

Mediations begin slowly. They are a formal process and the parties generally begin by setting out their stall, putting their case at its best and impressing the mediator with their legal position. However, the private sessions generally become less formal and more productive as the day wears on. To get the best out of the mediation you need to be properly prepared, as discussed above and:-

- Make sure you have full parameters to settle.
- Mediations often go on into the night. Prepare to stay late and do not schedule other appointments.
- Arrive on time. This will enable you to be focused and prepared and will send the right signals to the other side.

- Clarify the terms of your opening statement, what you want to achieve and who is going to make it.
- Be realistic. Avoid emotive language unless you sincerely have a problem on any particular issue.
- Avoid being too specific in your demands, especially early on in the process. Keep an open mind and be ready to explore new ideas.
- Avoid brinkmanship and be persistent. Many mediations go through low points but often a turning point can be achieved. Generally, the private meetings become very much shorter towards the end of the mediation and can be very productive.
- Mediation can be used alongside litigation. Consider at what stage mediation should be attempted.

what if I don't settle?

If a mediation does not lead to a settlement, do not despair. Often the mediator will offer to re-convene the mediation at a later date if both parties agree, or the parties are able to negotiate a settlement shortly thereafter.

All the partners listed below are able to advise you on mediation or any other form of ADR. We have acted for clients in high-profile mediations and various partners have from time to time acted as a mediator or adjudicator.

If you have any queries arising from the information in this paper please contact Anne McCarthy on 020 7360 8174, e-mail anne.mccarthy@ngj.co.uk

Please note that this paper is not a definitive statement of the law, but general guidance. Please seek professional advice before taking or refraining from any action in your own circumstances.

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