Mediation Guide

Mediation is a process which enables parties to resolve their disputes swiftly, cheaply and effectively. It is a way of avoiding lengthy and costly litigation and achieves a more satisfactory outcome for all - and it works even when all other attempts have failed.

1. What is Mediation
2. What happens at a mediation
3. Preparing for a Mediation
4. Benefits of Mediation
5. When to Mediate
6. Costs implications

Introduction

Mediation as an alternative to litigation, has grown out of an ever-increasing dissatisfaction with the legal process. Litigation is almost universally regarded as slow, cumbersome, costly and inadequate. Statistics show that over 90% of parties who tried to mediate their dispute would use the process again. The Courts now encourage it and penalise parties who unreasonably refused to take part. The Ministry of Justice is even considering making it compulsory or part of the litigation process.

Litigants often feel that
:

1. the award is too little
2. the judgment comes too late bearing in mind the time taken to reach court
3. the process was too costly
4. the whole process was too time-consuming and stressful
5. the litigation resulted in the end of a previously productive commercial relationship

Mediation can be used in multi-million pound international commercial disputes as readily as it can be invoked in small claims or neighbour disputes. It is swift, relatively cheap, and has a reported success rate of up to 90%.

How Mediation Works In The Legal Environment

Mediation is a form of Alternative Dispute Resolution (ADR) whereby a 'third party neutral' intervenes to facilitate and assist the disputing parties in reaching a mutually acceptable settlement. The mediator is neither a judge nor an arbitrator; he or she is not an adjudicator, nor someone who imposes a resolution or a settlement upon the parties. Instead, the mediator acts simply as a facilitator uncovering the parties' interests. The mediator will help by seeking to identify common aims and objectives, by re-opening lines of communication, and by developing mutually acceptable proposals for settlement. In this way, the mediator can gently move the parties away from a preoccupation with their rights and liabilities, and nudge them towards an exploration of their needs and interests the transition from a position of conflict to a position where they can resolve matters.

Mediation has three fundamental and distinctive elements:

It is consensual

The parties decide whether an agreement can be reached, and they control the nature and the terms of it. As the mediator does not impose any resolution or settlement or terms of an agreement upon the parties, there is not the inevitable 'win/lose' situation. The parties have absolute control of the outcome. Mediation is separate to the litigation process. The parties are entitled to withdraw from the mediation process at any time, and are not bound by anything said or agreed until such time as they sign a settlement agreement. However, once the agreement is signed, the settlement becomes as legally binding and enforceable as if it were the subject of a contract or a court order.

It is private and confidential

The mediation is held not in public but in private, and one of the cornerstones of the process is that it is confidential and without prejudice. Anything disclosed during the mediation is disclosed 'without prejudice' and cannot be used outside or in later proceedings should the parties fail to reach agreement. Moreover, any information shared by one party with the mediator will be treated in confidence and the mediator should not pass it on to the other party without specific permission to do so.

It focuses not on 'rights and liabilities', but on 'needs and interests'

The reason for the failure of many lengthy and protracted negotiations is that the parties all too readily fall into and get 'bogged down' in entrenched positions, and are unable to overcome the impasse that results. These entrenched positions derive from a rights culture a preoccupation with rights and liabilities, entitlements and obligations. Unlike litigation, which determines 'what happened in the past, why it happened, and whose fault it was', mediation looks to the future and encourages parties to re-evaluate their aims and objectives in the dispute by re-examining their current and their future needs and interests.

What happens at a mediation

The following is an outline of the format of a typical UK model of 'legal' mediation, generally accepted throughout this country in non-family mediation.

Venue and format

There are no prescribed rules as to where a mediation should take place. Following the coronavirus pandemic and the growth in home working, it will generally take place online by Zoom or Teams, particularly if the parties are based far away from each other. A remote mediation also saves the cost of hiring a venue or travelling long distances. Otherwise it will be conducted at one or other of the parties' lawyers' offices, or at a hired venue. It can even take place at a Court building. Mediators may use an assistant or co-Mediator, particularly in more complex mediations.

The mediation usually commences with all parties together in one room, invariably around a table. The mediator will make an opening statement in which he or she will outline to all present the aims of the process and the mediator's role in it. The mediator will outline and emphasise that his or her function is that of a neutral facilitator and not a judge. He or she will outline what is to happen, detailing the way in which joint sessions and private sessions will be used.

The parties' opening statements

Each party, and/or their legal advisor, makes a short opening statement, without interruption, setting out the main points of their case. This is a vital element of the mediation and its effect should not be underestimated. It can set the tone for the entire proceedings that follow. Where the dispute has hitherto been conducted by correspondence, it may well be the first time that the parties meet face-to-face; it will probably be the first time that one party has an opportunity to hear the other side's story first hand, rather than sifted, repeated, and interpreted by a number of intermediaries. It will invariably be the first time, for example, that one party's insurer or other decision-maker comes face to face with the other party. Sometimes it is the first opportunity to see the other side's lawyers 'in action'; this can often be a salutary experience, as each party will undoubtedly have had a mental image of the other side's lawyers, and perhaps to see that they are 'human', and doing just as good a job if not better than their own lawyers, can occasionally help to move the dispute forward. For these reasons, the opening statements can be a most therapeutic constituent of the process, and consequently the parties should use it to good advantage. However, sone people prefer to swerve the opening meeting, particularly if they do not want to meet the other party.

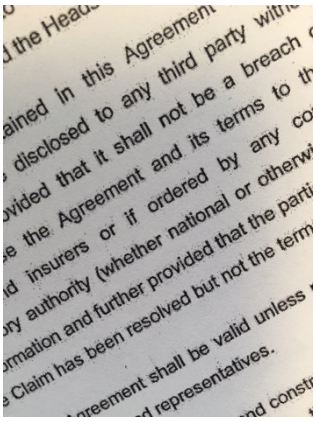
Private sessions

At the conclusion of the opening statements, the parties will generally (in the UK model of mediation) separate for the separate sessions into their respective rooms. This simply means the private individual session where the mediator sees each party privately and in confidence on their own. If there is a room allocated for the mediation itself, the mediator may invite each party to come to that room for the private sessions. More usually, however, the mediator will visit the parties in their respective rooms. The format will obviously depend upon the venue, the number of parties, whether the mediator is acting alone or with a co-mediator, and the facilities available in each room.

Joint sessions

The separate sessions will normally continue until such time as the mediator feels it appropriate to bring the

Joint sessions can effectively be used when the parties have reached a sufficient accord in principle, so as to justify bringing them together to finalise and shape the more detailed points of the settlement. Whether the parties have in fact reached such a stage may in itself be a matter of delicate judgment.



Settlement agreement

Once a true settlement is reached, the step that transforms the mediation from a voluntary non-binding process to a fully binding accord is the signing of a settlement agreement. The parties will need to create a document which they can each sign to signify their acceptance to being bound. A "Heads of Agreement" document will usually be drafted immediately, either by the parties themselves or by the lawyers if they are present, or by the mediator.

Preparing for mediation

Pre-mediation agreement

The mediator appointed by the parties for the mediation will be in a position to contact each party prior to the mediation itself, and discuss any issues the parties wish to raise in preparation for the mediation. This will usually include:

1. How much it will cost
2. Where or how the mediation is to take place
3. How long it is likely to last
4. Who will attend on behalf of each party
5. What documentation will be required by the mediator or by the parties

The venue

As stated above, many parties are avoiding physically meeting and finding that remote mediation is equally (if not more) effective.

If a physical mediation is arranged, care should be taken in the selection of a venue. Ideally it should be in 'neutral territory' so that neither party is likely to feel uncomfortable. Sometimes, however, such a venue is not feasible and the parties and the mediator may have to make do with what is available. Paul Randolph is very flexible about the choice of venue.

Ideally, there should be one room for each of the parties, large enough to comfortably hold the entire 'team' which each party wishes to bring. The parties may spend considerable periods of time in these rooms, so they need to be comfortable and have sufficient facilities available. The mediator will often use these rooms for the confidential private 'caucus' sessions, so the rooms need to be sufficiently distanced from one another so as to avoid fear of being overheard.

The venue needs to be available throughout the period envisage for the mediation. There is nothing more frustrating than parties almost reaching agreement at the end of a long day, and for the security guard to come in and ask everyone to leave as the building has to be closed!

The time

The commencement and the duration of the mediation is usually catered for and set out in the pre-mediation agreement. It is important for both parties to be clear as to the duration of the mediation - it is similarly frustrating for the parties to be deep in negotiation and for one side suddenly to say that they have to leave.

The attendees

It is important that neither side should be surprised at the mediation by the attendance of any particular person or party. The mediator will discuss who is to attend on behalf of each party, and this will enable him or her to deal as far as possible with any imbalance or perceived imbalances of representation. Thus if one side wishes to attend in person, whereas the other proposes to bring solicitor, counsel, experts, and witnesses, etc etc. the mediator can speak to both sides to explain and reassure where necessary.

The documentation

Mediators do not require box-loads of lever arch files in preparation - even for the most complex of mediations. The parties and their legal advisers should ensure that the mediator is sent:-

A brief case summary This should not be in the form of a 'legal Statement of Case': it is not helpful to the mediator or the parties simply to regurgitate the pleadings or to make submissions of law. The case summary should rather focus upon the needs and interests of the parties, and their wishes, hopes and aspirations for the mediation. It is an opportunity to make 'emotional' rather than 'legal' submissions.
Relevant correspondence This should include letters showing the current state of negotiations between the parties and any open offers made or rejected
Relevant documents Only documents which the parties regard as vital for the mediator to peruse in order to properly understand the issues in the dispute should be prepared for and sent to the mediator. Background information is often better gleaned personally by the mediator from the parties in private sessions.

Preparing the clients

Legal advisers can serve a very useful purpose in controlling their clients' expectations. Those parties who enter into mediation with unrealistic expectations will not advance their case or progress their aims and aspirations to the full.

When to mediate

As soon as parties in dispute are in a position to talk about a resolution of their dispute or to attempt to negotiate, they are ready to mediate. There are very few disputes that are not amenable to mediation. Some conflicts may be inappropriate to mediate as for example:

1. Where a definitive ruling on a matter of law is required
2. Where the visibility of litigation is important as a deterrent (as for example, to protect a trademark or copyright
3. Where injunctive relief is needed
4. Where some benefit can be derived by delay
5. Where there is no genuine desire to settle

Mediation can take place even before lawyers are involved, or before proceedings are issued. If on proceedings have been issued and litigation is underway, the court may stay the proceedings so that a mediation can be arranged.

You can mediate in most cases, if you or your client have:

1. A straightforward case - you simply need assistance in opening up lines of communication with the other side so as to help resolve the dispute quickly.
2. A complex case - which would benefit from issues being resolved, if not the entirety of the dispute.
3. A strong case - and you need a good mediator to 'knock some sense' into the other side.
4. A weak case - and you need a good mediator to 'broker a deal' so as to extract the maximum benefit from the situation.

It is important to bear in mind that sometimes you may not have all the information you need to be able to resolve your claim, like expert reports. However, it is worthwhile considering the cost of

obtaining this information and balancing that against the saving that could be made if the case is resolved earlier.

Benefits of Mediation

Mediation has the following benefits:

Speedy

A mediation can be set up in a matter of weeks, if not days. It thereby avoids the many undesirable consequences of protracted litigation - drain on costs and resources, damage to health, the destruction of businesses, termination of business relationships, and even marriages.

Low cost

The cost of mediation can start at just over £100 per party. It usually takes a matter of hours to complete and very rarely lasts more than one or two days, with very limited preparation involved - so costs can be kept to a minimum.

Parties retain control over the outcome

In litigation, parties relinquish control of their dispute: the Court controls the procedure, the level of disclosure, the evidence to be given, and the Judge has exclusive control of the outcome. In mediation the parties retain full control of the entirety of their dispute, allowing them to reject settlements with which they do not agree, and enabling them to reach more creative settlements or just 'good enough' settlements with which each party can readily live.

Therapeutic

It allows the parties their day in court more effectively than by going to court itself by allowing each person in dispute to be truly 'heard' to have their full and frank say to the mediator as well as to the other side in a 'safe' environment. It also facilitates apologies to be given or explanations made - which is often what parties really want.

Preserves relationships

Parties who end up in court, with a winner and a loser, will rarely be able to continue any commercial, trade or other relationship; whereas mediation allows parties to reach settlements with

which they are both content, thereby enabling them to continue with pre-existing business relationships.

Preserves privacy

Litigation often attracts unwanted publicity, with parties obliged to 'wash their dirty linen in public'. Mediation is totally confidential with each party retaining complete control over whether and what matters can be revealed. Confidentiality clauses are also frequently included in settlement agreements.

Diminishes imbalances of power

Parties often feel overwhelmed when fighting large corporations or government bodies. At mediation they are simply individuals around the table, and an effective mediator can protect parties against power imbalances.

Risks And Cost Implications

Risk Of Failing To Mediate

Both the Government and the Courts have been determined to promote Mediation as a prime form of dispute resolution.

The Civil Procedure Rules, the Commercial Court Guide, the Queen's Bench and Chancery Division Guides, and the various Pre-Action Protocols have all sought to encourage parties and prospective litigants to consider ADR as early as possible in their disputes.

The Courts, however, have increasingly imposed penalties in terms of costs if a party refuses to mediate or even simply ignores an invitation.

In Halsey v Milton Keynes General NHS Trust[2004] 1 WLR 3002, the Court of Appeal stated: "All members of the legal profession who conduct litigation should now routinely consider with their clients whether their disputes are suitable for ADR. The Court of Appeal indicated that the courts would be robust in their encouragement, and parties will now face significant adverse costs consequences if they unreasonably refuse to consider mediation." Since then, there have been innumerable decisions by the High Court and the Court of Appeal, all emphasising the importance of using mediation, and underlining the displeasure of the Courts when parties unreasonably refuse.

Costs implications

Fees are very flexible but see the fees page for some guidance as to fees. Mediation can be carried out in person, on the telephone or online.

There are risks of failing to mediate as a party who refuses can be penalised in costs.

The costs of mediation are normally shared between both parties and are not normally recoverable as a cost of the Litigation unless specifically agreed. The parties normally bear their own costs of the mediation.

ProMediate

We have a panel of expert civil and commercial (and workplace) mediators who can help resolve your dispute efficiently and cost effectively. They are members of the Civil Mediation Council and have an excellent track record of success. To set up a mediation or to talk through the issues, please get in touch.

Contact us at enquiries@promediate.co.uk to book a mediator

promediate