Bird & Bird
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Knowhow briefs

Mediation

Executive Summary:

- A practical guide addressing how parties get to a mediation, the ways in which a mediator is appointed, what parties should look for when appointing a mediator, what practical steps need to be taken prior to a mediation, the types of documents that need to be prepared for a mediation and what typically happens at a mediation, in terms of the different sessions that take place and the drawing up of a settlement agreement.
- Also touches upon what happens in the circumstances that a mediation fails and the implications this can have on settlement going forward.

What is mediation?

Mediation is a flexible process conducted confidentially in which a neutral person actively assists parties in working towards a negotiated agreement of a dispute or difference, with the parties in ultimate control of the decision to settle and the terms of resolution. Unlike a judge or arbitrator, the mediator will not decide the case on its merits, but will work to facilitate agreement between the parties.

The benefits of mediation

- Mediation is voluntary, but refusal to mediate can give rise to cost sanctions in court proceedings.
- Courts actively encourage parties to consider mediation.
- Mediation is confidential and 'without prejudice' (nothing said in the mediation is admissible as evidence in legal proceedings).
- Any settlement reached is legally binding once put into writing and signed by the parties.

Mediation has a number of advantages over litigation and arbitration processes:

- Quick - most mediations are arranged within a few weeks (and can be arranged even more quickly) and the formal mediation session usually lasts for one or two days only.
- Cost effective - compared with litigation and arbitration processes, mediation is a less expensive route to resolving disputes.
- Gives parties control over the process and the outcome.
- Mediation can maintain business relationships far more effectively than adversarial processes.
- A wide variety of settlement options can be achieved in mediation over and above monetary settlements.
- Informal and flexible - the process to suit clients' needs.

How do parties get to a mediation?

There are a number of ways of getting a dispute to mediation:

1. Parties can simply agree to mediate. If a party has decided that the time is right to mediate, they could approach the other side directly (or through lawyers) to try to agree this.

2. If there is a mediation clause in the contract to which the dispute relates, the parties may have little choice but to mediate.

3. In some cases the courts will recommend or order mediation. For example, if a party refuses to mediate, the opposing party may be able to request an ADR order from the court which could stay the court proceedings until the matter is referred to mediation.

4. The courts are increasingly determined that the parties should at least consider some form of ADR (such as mediation) at an early stage and that they should have good reasons for not using ADR. This is likely to be considered by the court at the first case management conference.

How is a mediator appointed?

Usually parties will be able to jointly select a mediator that they consider most appropriate to mediate their dispute. If they are unable to agree, the parties can ask a third party (such as a mediation service provider) to select a suitable mediator for their dispute. A well-drafted mediation clause will identify a person or body (e.g. The centre for effective dispute resolution ("CEDR")) to fulfil this role. In some situations a mediator can also be appointed by the court.

What should you look for when selecting a mediator?

There are a number of factors that can be taken into consideration when choosing a mediator:

1. **Professional background.** Parties may wish to select a mediator with a particular professional background (for example a lawyer or accountant) depending on the nature of the dispute. In practice, however, general mediation skills (effective communication and negotiation skills) are likely to be at least as important as knowledge of specialist areas or a particular area of law. Irrespective of the mediator's background, the ability to "reality test" the parties' strengths and weaknesses is essential in mediation. To do this effectively, the mediator must have some understanding of the potential outcomes (including litigation) if an agreement is not reached at mediation.

2. **Subject matter expertise.** It is not essential to appoint a mediator with specific technical or sector expertise. Whether a party wishes to have a specialist mediator is a personal preference. The following considerations are relevant:

    2.1 the complexity of the matter/whether technical issues are at the heart of the dispute;

    2.2 how feasible it is (in terms of cost and availability) to find a mediator who meets the requirements of the parties and who is also a subject matter expert.

3. **Mediator style and personality.** A mediator's style and personality is an important part of selecting a mediator. Parties need to have confidence and trust the mediator and also be able to spend time with them during the mediation**.** When considering style, parties should consider:

    3.1 do the parties want the mediator to adopt an evaluative, robust approach? Are they happy for the mediator to offer opinions on how a court might resolve the dispute?

    3.2 would the parties prefer a more facilitative approach (where the mediator will avoid giving advice to the parties or predicting outcomes)?

    3.3 does the mediator have an air of authority to give the parties confidence and trust?

4. **Mediation experience.** Parties should take into consideration the mediator's experience, including the number of mediations he/she has conducted, the subject matter and value of the disputes and whether he/she has had experience of similar cases.

5. **Impartiality.** The mediator's neutrality is key to the success of the process as it maintains the mediator's credibility. Questions can arise when the same mediator is used frequently by a party. A mediator should therefore disclose prior work as a mediator for a particular party to avoid this.

6. **Cost.** Cost will undoubtedly be a factor when selecting a mediator. When evaluating cost, parties should consider whether the mediator charges a fixed fee or hourly rate, what expenses they charge for and whether there is a cancellation fee.

7. **Availability.** Availability will also influence who it is the parties appoint, especially if they are planning to carry out the mediation on a short timetable.

What do you need to do prior to a mediation

There are no set rules governing the preparation for, or conduct of, a mediation. However, the following stages are often involved:

1. **Agree the process with the other party/parties.** What papers are to be exchanged in advance between the parties? Will any papers be provided to the mediator only (confidential briefs)? Is there a page limit? How will the mediation proceed on the day, and will the parties' legal representatives attend?

2. **ADR Body.** Decide on whether to use an ADR body (e.g. CEDR) to help in setting up and running the process. Note that external lawyers will be able to advise on the choice of mediator and it may well be unnecessary to involve an ADR body.

3. **Administration.** Consider and make arrangements for the administrative aspects of the mediation, such as where, when and for how long it should take place and the number of attendees.

4. **Mediator.** Appoint a mediator (see above).

5. **Risk assessment.** Carry out a risk assessment. What are the strengths and weaknesses of the case? What level(s) would you be prepared to settle at? What are your limits and what are the risks (e.g. to the business in terms of cost and reputation) if no settlement is reached?

6. **Team.** Assemble the team for the mediation. This should always include a representative who has the authority to enter into a binding settlement on the day of the mediation. If lawyers will not attend, ensure that they are on stand-by to assist with any settlement agreement.

7. **Preparation.** For example, prepare a written case summary and supporting documents and an opening presentation and a strategy for the negotiations in the mediation. This will be dependent on the precise agreement between the parties. In addition, you may also find it useful to prepare a skeleton settlement document and/or documentation to stay or withdraw litigation/arbitration proceedings, as this is likely to save time on the day.

What documentation do you need to prepare for the mediation?

1. The usual documents that parties agree to prepare consist of a short case summary by each party and a set of key supporting documents, preferably a joint set of documents agreed between the parties. The documents should be kept short and consideration should be given specifically to agreeing the maximum length or volumes of these documents.

2. The primary purpose of the case summary is to explain as succinctly and persuasively as possible to the other party your position and objective in the mediation. The secondary purpose is to explain the dispute, and the party's position in it, to the mediator. It should include details of any previous settlement discussions, and of any "part 36" offers and/or payments into court. It can also be helpful to include a chronology.

3. The documents are usually exchanged between the parties and supplied to the mediator at least a week before the mediation. If an ADR body is involved it may facilitate the exchange of the documents.

What happens at the mediation

1. A typical mediation consists of the following stages:

1.1 **Opening Session.** The mediation will begin with a joint session chaired by the mediator (often referred to as a "plenary" session). He/she will outline the mediation process and the different stages that will follow, explain the roles of the mediator and the parties, establish the ground rules for the mediation and address the practicalities of the process. Each party will then be invited to make a brief opening statement to give their perspective of the matters in dispute and to highlight issues of particular concern. This may be followed by each party seeking further clarification of points raised in the opening statements, which may lead to initial across-the-table discussions.

1.2 **Private Sessions.** The mediator will then attend private meetings with each party. Here the mediator will gain a better understanding of each party's position. The private sessions will take up most of the time of the mediation, moving from initial exploratory stage to the negotiating stage.

1.3 **Reconvened joint session.** If the mediator thinks negotiations are at a stage where the parties are likely to make more progress face to face, he may bring some or all of each of the parties back together.

1.4 **Settlement Agreement.** If the parties reach agreement, the mediator will, where feasible, insist that this is written out and signed. Once signed it becomes binding. Even if it is impossible to produce a comprehensive agreement, as much as possible should be documented and signed as a "Heads of Agreement". Ideally the steps taken to conclude the final agreement should also be set out so that the parties know exactly how they reached their current position and how matters will then proceed.

2. Even if the mediation fails, it is sensible to make a note of what the parties' positions were/where they stood when the mediation was abandoned. This may be of assistance in future negotiations.

3. Do not be disheartened if the mediation fails. A significant number of failed mediations are settled shortly afterwards.

Practical Application

1.1 We were instructed by a client where the disputed contract contained a mediation clause. The dispute was of a very technical nature so both parties agreed that it would be useful to appoint a mediator with specific technical expertise. We helped our client to find a mediator who met this requirement whilst also having the right style, personality and experience to suit the parties and the dispute. We also made sure that the cost of the mediator was taken into consideration and was proportionate to the sums in dispute.

1.2 We assisted our client with all the necessary preparation prior to the mediation, including preparing a written case summary and an opening presentation and considering the best negotiation strategy for the mediation.

1.3 The mediation was held at our offices. Following the opening session the parties broke into private sessions which gave our client the opportunity to explain its position to the mediator in more detail.

1.4 After much negotiation the parties finally reached agreement just after midnight. A heads of agreement was signed in the early hours of the morning and a settlement agreement within the few days that followed. Our client was extremely pleased with the result from a commercial perspective but was also relieved that a relatively swift resolution had been achieved, meaning it would not have to undertake protracted court proceedings.

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