Bindmans

DISPUTE RESOLUTION FOR BUSINESSES

Mediation

WHAT IS MEDIATION?

Mediation is a form of alternative dispute resolution (ADR), whereby parties voluntarily agree to participate in a meeting with a third party independent mediator to see if an agreement can be reached in relation to their dispute. The mediator is present to see if they can narrow the issues between the parties and, if possible, facilitate an agreement between the parties. They are not there to make a decision and should remain neutral throughout the process.

In some mediations, known as evaluative mediations, the parties may ask the mediator to evaluate the relative strengths and weaknesses of each parties' case, but the decision on whether or not to settle (and on what terms) remains with the parties.

Mediation is often seen as a quicker, more cost effective and cheaper alternative to formal Court proceedings and a way of the parties reaching a compromise to their dispute. Mediation is, however generally not compulsory, and requires both parties to agree to mediate and engage in the process if they wish for the mediation to be successful and a resolution achieved.

Mediation is a non-binding form of ADR and therefore if parties are able to reach a settlement to their dispute, the terms of the settlement should be recorded in a written agreement and signed by all parties to ensure that there is then a binding agreement.

Mediations usually take place on a 'without prejudice' basis, meaning that the parties are free to discuss any matters to hand and where appropriate, concede any points they may wish to concede if they feel it may help lead to a settlement. As the mediation (and preparation for it) are without prejudice, anything that is discussed at the mediation cannot be used in any ongoing or subsequent Court proceedings. Parties will usually be asked to sign an agreement prior to the mediation to confirm the same.

Most disputes can be mediated, and the flexible nature of mediations make them ideal for certain types of cases, especially those which may need to be resolved quickly or confidentially. If a party is seeking a solution that cannot be ordered by a Court, then a mediation will be more appropriate.

However, mediations cannot deal with disputes that involve a question of law, or may not be appropriate when the parties are so far apart in their respective positions that mediation has no realistic prospect of success.

WHEN SHOULD I MEDIATE?

Parties can offer to mediate at any time during the course of their dispute. There is no need for formal Court proceedings to have been commenced. However, it is often more useful for parties to know their opponent's position before deciding to mediate. This can be after the parties have exchanged pre-action correspondence, or after one party has issued a claim and the other party has put in a defence. If the parties know the respective position of their opponent, then there is less chance of one party raising a new argument at the mediation itself and the parties can focus on trying to reach a settlement, rather than focusing on legal arguments.

HOW DO I ORGANISE A MEDIATION?

As mentioned above, mediations are voluntary and will only be able to be organised if both parties agree to mediate their dispute. For some small claims track cases, if the parties agree to mediate the dispute, the claim can be referred to the Small Claims Mediation Service, who will then organise the mediation. NB – the government are presently considering whether mediation should be compulsory in small claims track cases.

However, for most disputes, it will be up to the parties (or their legal advisers) to agree and subsequently organise the mediation.

Once the parties have agreed to mediate, they will then need to agree a choice of mediator. There are a number of organisations that offer mediation providers, and parties may decide to approach these organisations to see which mediators are available and which may be the most appropriate for their particular dispute. Alternatively, one party may suggest a choice of a number of different mediators (with whom they would be prepared to mediate), and allow their opponent to select one of the options.

For example, if you have a property dispute, then it is usually beneficial to instruct a mediator with property experience, so that the parties do not need to explain any technical information to the mediator throughout the day of the mediation.

Mediators are often professionals, such as barristers, solicitors, accountants or surveyors with particular expertise in a particular field, and this will influence the parties' choice of mediator.

PREPARING FOR MEDIATION

Once a mediator has been agreed between the parties, he or she will make contact with the parties (or their legal representatives) in order to set out a basic timetable for the mediation itself, and what documents he or she will require in order to allow the mediator to prepare for the mediation.

Normally the mediator will ask the parties to agree a core bundle of documents that they may need to refer to on the day of the mediation. This may consist of pre-action correspondence or any other relevant key documents, or where proceedings have commenced, copies of the statements of case.

The parties will also each usually prepare their own Position Statements, which is usually a short case summary setting out that party's position and any issues that are in dispute and are likely to be discussed at the mediation itself. The Position Statements allow the mediator to understand each party's respective position and identify those areas where the parties may agree or disagree. They also allow both the parties and the mediator to understand the strengths and weaknesses of their opponents.

Position Statements are often prepared by a parties' legal advisor (with input from the party) and may set out details of costs to date, likely anticipated costs going forward and any previous offers of settlement the parties have made. The Position Statement may also include any key legal or factual issues and an explanation as to why a party is not prepared to concede on certain issues.

Position Statements are drafted on a without prejudice basis, so that anything that it stated within the Position Statement cannot be referred to in any ongoing or subsequent legal proceedings. This allows the parties to be as honest and open as possible.

WHAT HAPPENS AT THE MEDIATION?

The parties (or their legal representatives) will have normally discussed how the mediation will proceed prior to the mediation itself, so that there are no surprises on the day.

After the parties have arrived, the mediator will usually invite all of the parties to sit in one joint meeting (known as a 'plenary session'), so that introductions can be made. The mediator will then usually give an overview of how the mediation will be conducted and will remind the parties of the without prejudice nature of the mediation. If there are any administrative formalities to complete, the mediator will usually attend to them at this time.

The mediator will then invite each of the parties to make their own opening statement (if this is what the parties have chosen to do). It is important that each party listens to their opponent's opening statement carefully and without interruption. Whilst it is fairly normal for parties to become emotional during their opening statements, parties should avoid insulting their opponent or asserting blame on their opponent.

If the parties do not want to take part in a plenary session, then each party will retire to its own room.

Sometimes plenary sessions are useful as they allow a party to see their opponent, and it may be the only opportunity during the day when a party can put forward their position in their own words and emotions

As legal advisers have usually been involved up to this point, it may be one of the first times when the actual clients come face to face, so that each can see what the case means to the other. Often parties have become so entrenched in their positions throughout the litigation process, that sometimes this plenary session can serve as a way to 'break the ice' or make an apology, if one party is looking for an apology from their opponent.

The need for a plenary session is one which will be decided between the parties and the mediator. If one party does not want a plenary session, the mediator will not force the issue.

Once each side has put forward their opening statements, then the mediator will usually ask the parties to retire to their respective rooms.

The mediator will then usually visit each of the respective party's rooms to ask any questions that he or she may have regarding anything that may have arisen from the position statements or plenary session. These meetings are completely private and the details of what is discussed will not be shared with your opponent unless you give the mediator specific instructions to share a particular issue. Once these meetings have taken place, the mediator will start the process of shuttling between rooms to see if either party is willing to put forward any offers or counter offers, to see if issues can be narrowed and any settlement reached. As before, the mediator will only put forward offers from a party once he or she has specific instructions to do so.

If time is limited, the mediator may limit the amount of time he or she spends with each party, so that each party spends a similar amount of time with the mediator. However, in practice, a mediator will often spend more time with one party than the other, simply because one party may be more pro-active during the mediation, or may require things explaining in more detail as to why the other side has put forward a certain offer or is not prepared to concede on certain points.

The mediator will then see if he/she is able to facilitate an agreement between the parties. If both parties are engaged in the process and willing to concede on certain points, then reaching an agreement should hopefully be achievable. However, if the parties reach deadlock, it will be up to the mediator to see if they can break the deadlock, and continue negotiations.

The mediator may suggest that there be a further joint session between the parties or may suggest that the parties or the parties' legal representatives meet separately to see if any areas can be narrowed. The parties may ask the mediator for his evaluation of their respective positions, as sometimes hearing a point from an independent third party may cause one party to reconsider their position on certain

issues. One of the benefits of mediation is the flexibility for the mediator to try different approaches to try to reach a resolution.

Mediators will often ask the parties to consider what will happen if the parties fail to reach an agreement. They will highlight the likely costs of taking the dispute to trial and the potential costs consequences if a party loses at trial. Whilst this should have already been explained to them by their legal advisers, hearing it from an independent party can sometimes cause parties to reconsider their position.

SETTLEMENT

If the parties are able to reach an agreement to settle at the mediation, it is vitally important that the terms of that settlement are documented, and that the document is signed by each of the parties. As mediation is a non-binding form of ADR, the only way either party can seek to enforce a breach of any of the settlement terms is for such terms to be put into writing and signed by each party, confirming their agreement to the terms.

If legal advisers are going to attend the mediation, it is a good idea for them to have prepared a draft settlement agreement beforehand. This will save on time if an agreement is reached, which may be late in the day after lengthy negotiations when each party simply wants to go home.

REMOTE MEDIATIONS

Since the Covid-19 pandemic, remote or virtual mediations have become more commonplace, and indeed show no sign of slowing down. The advantage of remote mediations is that parties who come from different parts of the country (or indeed different countries) can attend the mediation and save on the cost of travel and accommodation. Obviously, if you are attending a mediation remotely, it's important that you have a good wi-fi connection and are somewhere that you will not be disturbed.
Small claims track mediations often take place by way of telephone, so parties cannot see each other.

COST OF MEDIATION

Normally, the parties will agree to share the costs of the mediator. The mediator may offer to conduct the mediation for a fixed fee, which will include preparation time and around an eight-hour mediation. Any additional cost for hours that are required on the day or thereafter will again be split between the parties.

Parties also need to take into account the cost of their legal representatives attending the mediation, together with their preparation time too. This can include the cost of Counsel attending as well as solicitors, if a party wishes for their barrister to be in attendance.

If the mediation is to take place at a neutral venue, the cost of the venue is again usually split between the parties.

Some mediation providers will offer lower fixed fee mediations for a half-day mediation. Often these shorter mediations can be more effective as parties have to be more focused given they only have a short time frame in which to try and reach a settlement.

Mediations can usually be arranged at relatively short notice and normally cost much less than a Court trial. As such, they should be considered seriously by parties involved in a dispute.

Whilst mediations are not compulsory, if a successful party refuses to mediate without good reason, then their unsuccessful opponent may be able to rely on their refusal to mediate at any subsequent trial on the subject of costs. Parties who unreasonably refuse to mediate may be penalised in respect of costs, so that even if a party is successful at trial, if they have unreasonably refused to mediate, then then may not recover their costs of any subsequent trial (despite having been victorious).

WILL MY CLAIM SETTLE AT MEDIATION?

Whilst there is no guarantee that the parties will be able to reach an agreement to settle their dispute at the mediation, the success rate for settlements either at mediation (or shortly thereafter) is quite high. This is usually due to the fact that even if the claim does not settle at the mediation itself, the parties have been provided with an opportunity to hear their opponent's position and even to consider offers. As such, the issues that existed before the mediation have often been narrowed and the parties may look at their own case (and that of their opponent) in a different way following the mediation. If the mediator has done a good job, they will have explained the risks to each party of not settling the dispute at the mediation.

However, a settlement can only be achieved if the parties are willing to engage properly in the mediation process and concede certain points on the day. If a party attends a mediation and simply refuses to move from their original position, then any settlement is unlikely, unless their opponent concedes from their own position. Adoption of such an entrenched position is unlikely to lead to a settlement and will simply be a waste of time and costs.

Parties should adopt a commercial approach where possible, as this is again more likely to lead to a settlement. Whilst factual and legal issues may be relevant and debated during the course of the mediation, a patient, flexible approach, with each party listening to their opponent, is more likely to lead to a settlement as opposed to a confrontational or adversarial approach.

As such, it is vital to ensure that anyone who attends a mediation attends the mediation in good faith and is able to agree a settlement which binds that party, or who has authority to make such a binding settlement. Usually, before the mediation starts, the mediator will have asked the parties to confirm this, so that if any agreement is reached, there is no further delay in committing that agreement to writing and ensuring a binding agreement is concluded before each party goes home.

As mediations are much more fluid than a Court trial, they provide the parties with an opportunity

to consider alternative settlement options. As set out above, it may be particularly important for one party to receive an apology from their opponent for what they believe the opponent has done wrong. A Court is not able to force a party to apologise to an opponent, but an apology provided in a mediation may go a long way to resolving a dispute. As the mediation process is without prejudice, any such apology is usually given without any admission as to liability.

Mediations also allow clients to put forward their positions without the fear of being cross-examined. Whilst a mediator may seek to challenge something a client says in a private session, the mediation process is not adversarial in the same way that a Court trial is. The mediator's role is to see if an agreement can be reached. They do not determine the terms of any settlement and if the parties cannot agree a settlement, they are both entitled to walk away and commence (or continue with) their Court litigation if they wish to do so.

GET IN TOUCH

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> The lawyers have incomparable client service skills. They are very clear and always make sure they understand the picture, even if it is a complicated one.
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