CLIENT GUIDE: MEDIATION

This Client Guide sets out what Mediation is and when and why to use it.

What is mediation?

Mediation is a voluntary form of Alternative Dispute Resolution, which involves a process of structured 'without prejudice[1]' negotiation facilitated by an impartial third party known as a 'mediator'. The aim is to produce a settlement of the dispute that is acceptable to both parties, and the process enables them to retain control over whether or not they wish to settle, and on what terms. It is recognised as an efficient process which can assist parties to work through a deadlock situation, saving time and money, particularly when compared to litigation and arbitration.

Mediations have traditionally been *'facilitations'* whereby the mediator enables and encourages the parties to explore their case or positions with a view to agreeing a compromised settlement. There is, however, a type of mediation known as *'evaluative'* in which the mediator plays a more dominant role and expresses an opinion on the merits or strengths of each parties' case and thereby encourages compromise and hopefully settlement.

The type of mediation and the identity of the mediator requires a significant amount of thought and is a highly strategic stage in the action.

Court and arbitration support of mediation

Mediation is actively encouraged and supported by the English courts (for example in the pre-action protocol) and by arbitration institutions; the English courts emphasise that a request to engage in mediation should be given serious consideration and should only be refused in exceptional circumstances. Parties refusing to attempt mediation may find themselves being penalised in costs.

Participants in the mediation

The parties:

Successful mediations will include a party's legal advisors, and occasionally it is helpful to have technical participants, such as experts, but is usually wise not to have too large a team. Each party's team attending the mediation should be kept as small as possible, but the client group must include a senior representative with full authority to settle on the day without needing to revert or to seek permission from those not in the room, and ideally another senior executive who is not closely involved in the events relating to the dispute, and who will be able to form a relatively objective view of the dispute.

The role of the mediator:

The mediator's role is to facilitate the negotiations, challenge assumptions, and to encourage the parties to be realistic about the likely outcome if the matter proceeded in litigation or arbitration.

The mediator, in contrast to a judge or arbitrator, will not make a decision about or determine the matter. Their role is to work with the parties to facilitate an amicable settlement of the dispute.

The mediator will discuss a party's position privately with each of them, and ensure that they are being as objective

1 Broadly speaking, 'without prejudice' protects the mediation and any admissions made therein from being referred to in evidence before the court. Thereby, enabling the parties to speak freely.

as possible about their own, and the other party's, legal and commercial positions. This may include encouraging the parties to look at the best and worst alternatives should the mediation not succeed.

The mediator will encourage the parties to focus on looking to the future and their commercial needs and objectives, rather than analysing past events and trying to establish their legal rights. That is to be contrasted with the courts, where the legal rights and entitlements of the parties are paramount.

The mediator will concentrate on the problems and how to solve them, not the people and any vested interests that they may have.

The role of the lawyer:

Whilst mediation is a process for the parties – and the parties should always be in attendance – your lawyer still has an important role to play.

1. Lawyers will draft the mediation position papers, that is a document setting out each party's position and a summary of the claim/defence. It is essential that this is well drafted.
2. Lawyers attend the mediation and frequently make the opening statement in the first all party meeting at the start of the mediation, provide support, and of course will give legal advice throughout.

Lawyers draft the settlement agreement, and will ensure that any agreement reached is enforceable.

Benefits of mediation	Disadvantages to mediation:
1. **High success rates** 2. **Flexibility:** Mediation is able to achieve flexible solutions beyond those available in a formal dispute resolution processes - and is able to take into account the parties' wider commercial interests, working relationship going forward, reputational integrity, and other 'non-legal' factors. 3. **Confidentiality:** The entire mediation process is confidential and is conducted on a "without prejudice" basis. 4. **Consensual:** designed to move the parties towards common ground and compromise, and increases the potentiality for reconciliation. 5. **Parties are fully involved** 6. **Own choice of mediator** 7. **Fast resolution:** usually over in a day.	1. **Cost & Delay implications:** The costs of the mediation will often be split equally between the parties and will not usually be recoverable. Likewise, if the mediation fails and arbitration or litigation follows, then it will increase the overall cost of resolving the dispute, as well as causing a possible delay in the progression of the case to trial. 2. **Contractual:** A settlement agreement formed as a result of mediation (generally speaking) is contractual in nature, and does not have the same status as a judgment or arbitration award. Parties should keep in mind general contractual principles throughout, so as to avoid the risk of finding that their settlement is unenforceable or incomplete. 3. **Revealing your hand:** it is likely that during the course of the mediation parties may reveal future litigation strategy.

Mediation is a flexible process whereby the parties agree the procedure to be adopted in consultation with the mediator, who will often have a preferred mediation format. Mediations tend to follow this structure:

Mediation agreed upon and Mediator chosen:

Firstly, parties should agree on the appointment of an appropriate mediator. If the parties cannot agree, then the resources of a mediation service provider, such as CEDR, can assist the parties to find a mediator who is acceptable to both parties. There will also be a written mediation agreement creating obligations of confidentiality on the participants and stating that the Mediation is "without prejudice".

Parties prepare:

Each party usually prepares a brief written summary of its position (not just its legal case) for the Mediator and the other party, with the key supporting documents. These are exchanged between the parties, and sent to the Mediator, before the start of the mediation. The parties must enter into a written mediation agreement once the details of the Mediation (e.g. place, time, name of Mediator) have been agreed. A confidential briefing paper is sometimes also prepared for the Mediator's eyes only and the content of any such briefing is not disclosed to the other side without express approval.

The day of the Mediation:

At an opening joint meeting, each party briefly sets out its position. A series of private confidential meetings follow between the Mediator and the teams of representatives present at the Mediation for each party. These are confidential between that party and the Mediator, who will only reveal points from private meetings if they have express permission to do so. This will then usually lead to further joint meetings between some or all members of each of the teams.

Most Mediations go through a stage where it seems unlikely that there will be any useful outcome and yet the majority settle; so optimism and determination to solve the problem are essential.

Settlement agreement:

If a settlement is reached, its terms will be written down and signed by the parties at the end of the Mediation. Care must be taken to ensure that the agreement is enforceable.

When to use Mediation

MEDIATION FRIENDLY

- Confidentiality is a priority
- A speedy resolution is key
- Ongoing commercial relations between the parties
- Complex cases involving high legal costs
- Cases involving 'points of principle' between the parties

MEDIATION UNFRIENDLY

- Cases requiring a point of law to be determined
- Where the court's supporting powers are needed e.g. when an injunction is required
- Cases involving fraud

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This client guide was produced by the HFW Knowledge Management team, should you require any further information or assistance with any of the issues dealt with here, please do not hesitate to contact them at KM@hfw.com or your usual HFW contact to discuss.

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