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Mediation

Inside

Introduction

Mediation is a common method of alternative dispute resolution ('ADR'). It is a consensual process, with any settlement having to be agreed by both parties.

If successful, mediation can save the time and costs of fighting a dispute through the courts or in arbitration. Mediation gets the parties to a dispute round the same table to settle their differences. Its use is actively encouraged by the courts.
A mediator trained in negotiation techniques tries to help the parties find some middle ground and an acceptable compromise of their dispute.

Mediation is a private process and those taking part can avoid publicity, unlike in court proceedings.

What is mediation?

Mediation is a private dispute resolution process in which a neutral person – the mediator – helps parties to a dispute to try to reach a negotiated settlement. It is for the parties to reach an agreement; the mediator has no power to impose solutions. Although mediation is not new, it's a very popular means of resolving disputes and through the use of pre-action protocols, the courts encourage parties to settle their differences by mediation. One of the main characteristics of mediation is its flexibility. Parties to a dispute can agree to mediate when and where they want, can appoint whom they want as mediator and can agree any form of solution they like.

When and how?

A mediation can take place before court proceedings are issued or at any point during those proceedings. An agreement to mediate is sometimes included in contracts and is generally binding on those parties.

Having identified a mediator available on a date convenient to the parties, the parties will normally enter into a mediation agreement with the agreed mediator. The mediation agreement should provide that the parties have agreed to try to resolve their dispute by mediation and that it will take place on a particular date with the agreed mediator. The agreement should make it clear that the mediation is confidential and without prejudice, i.e. documents prepared for the mediation, discussions held at the mediation, and offers to settle cannot subsequently be referred to in any court proceedings. The agreement will also usually provide that the mediator's fees and any other mediation costs are split equally between the parties. Traditionally, the parties must pay their own costs of preparing for and attending the mediation but it is not uncommon for parties to agree that they should be included as part of the overall costs of the litigation process.

As a result of the Covid-19 pandemic, remote or virtual mediations have become much more commonplace, with parties attending via video call. This can be of particular benefit where geographical or other issues make in-person attendance difficult.

What mediation isn't

Arbitration

Arbitration is the submission of a dispute to a specified third party - the arbitrator - for decision. As with court judgments, the decision is binding on the parties. Arbitration normally takes place because the parties have expressly provided for it in their contract. That election is binding on the parties. The arbitrator's decision is normally the end of the matter; the dispute can usually only be referred to the court in certain very limited circumstances, e.g. if there has been a serious irregularity in the arbitrator's decision.

Conciliation

This is a process similar to mediation, but here the third party - the conciliator - takes a more active role. It is not uncommon, if the parties cannot find a settlement themselves, for the conciliator to make a non-binding recommendation. As a result, it is akin to mediation which, if unsuccessful, is immediately followed by an early neutral evaluation.

Early neutral evaluation

Early neutral evaluation (which is not that common) is a preliminary assessment or provisional judgment of a dispute by an agreed independent third party, such as a senior lawyer or judge. The evaluator arrives at a non-binding decision as to which party, in their view, would win the dispute if the dispute went to trial or arbitration hearing. The evaluator does not try to find common ground or an acceptable settlement as in mediation. Its main purpose is to limit the scope of full proceedings or to serve as a basis for further negotiation.

Adjudication

Every party to a construction contract

has the right to refer a dispute arising under that contract to adjudication. An adjudicator's decision is, at least in the interim, binding on the parties. Even an unwilling party can be forced to participate in adjudication. As mediation is consensual, a party cannot be forced to mediate, nor can a "solution" be imposed upon it.

Who are the mediators?

Parties are free to agree upon who they wish to be the mediator of their dispute. Many mediators of commercial disputes are barristers, often QCs, but many solicitors also practise as mediators. A mediator need not be a lawyer. Where technical knowledge is required, respected professionals from the relevant industry are often instructed. Mediation service providers have panels of accredited mediators, with a variety of specialisms, who are available to mediate disputes. Such bodies have pro-forma mediation agreements and can deal with the logistics of how the mediation is to take place. Alternatively, there is nothing to prevent the parties from identifying their own mediator.

Mediators have different styles and skills. Some are more interventionist than others. Traditionally mediators do not offer an opinion on the merits of a party's case and view their role as purely facilitative, i.e. they are only there to help the parties reach a settlement. However, it is also possible to have an 'evaluative' mediation, where the mediator does express a view on the strength of a party's case.

The mediator has a responsibility to disclose all actual or potential conflicts of interest of which they know, which could reasonably be seen as raising a question about their impartiality, before accepting the appointment.

Why do it?

Mediation can have several advantages over litigation, or a party-to-party negotiation.

Getting round the table early

Although traditional without prejudice negotiations can often result in settlement, having a neutral facilitator in the form of the mediator can help to push the parties towards settlement. Mediations can take place as soon as the parties want and if successful, will result in a considerable costs saving compared to a door-of-the-court settlement. It is not uncommon for a mediation to be held in the pre-action phase before proceedings are issued. Choosing the right time to mediate during the course of the dispute can be crucial to its potential success.

Finding the middle ground

During a mediation momentum often builds toward settlement. That momentum is possible because the parties have decided to do their best to settle their dispute, they have set aside time to do so, and the decision-makers who can authorise settlement have made themselves available. The skill of the mediator is in identifying and exploring a middle ground where settlement may be reached and then driving the process to get there. A high proportion of mediations result in a settlement on the day. Where they do not, a significant number of cases settle shortly after the mediation on the basis of negotiations begun at the mediation.

Encouraging openness

Mediation allows the parties to express how they really feel about their dispute, beyond the purely commercial, to explore creative solutions and to debate propositions with a neutral third party. Mediations often assist in overcoming emotional or personality blocks to a settlement.

Speed

If the parties co-operate, mediations can be set up quickly. They usually only last a day (or a few days in the most complex cases).

Cost-effectiveness

Although the mediator will charge a fee and there are preparation and attendance costs, if the mediation results in a settlement, it will almost always be much cheaper than resolving the case at a full hearing (whether a court or an arbitration hearing). Obviously the earlier the mediation, the greater the cost saving. However, some mediations fail because they are held too early, before each party has formed a view as to the strengths and weaknesses of their case and of their opponent. It is always possible to hold a further mediation later in the proceedings, if the parties agree to this.

Confidentiality

Mediations are confidential. Others in the parties' industry and the general public need not know anything about the dispute or the terms on which it is settled. The parties can say what they really think in a private session with the mediator; the mediator will only tell a party what the other party has said if the other party has expressly authorised the mediator to release that information.

Creative solutions

In a mediation, parties can agree on solutions that a judge or arbitrator is unable to provide. The parties can structure a settlement in any way they want. This is especially useful when the parties want to preserve an existing business relationship.

How does it work?

Mediations generally follow a relatively straightforward format.

Shortly prior to the day agreed for the mediation, the parties will exchange their case statements or position papers together with copies of the key documents on which each party wants to rely. The mediator may well contact the parties or their legal advisers in advance to identify the key issues in dispute and potential sticking points.

Assuming it is a one-day mediation,

the day normally begins with a plenary session (i.e. with all attendees together). The mediator introduces themselves and asks those attending to do the same. Each party then makes a short opening statement. The opening statement is usually given by one of the party's representatives or the lawyer, or a combination of the two. The opening statements give an opportunity to stress the parts that really matter to the parties, and can have an effect of 'clearing the air'.

After the opening session, the parties usually go into separate break-out rooms. The mediator then shuttles between the parties' rooms throughout the day, exploring particular points or issues with the parties, encouraging them to try to narrow the differences between them, and to make offers of settlement. The mediator will use a variety of techniques. They will alert the parties to the risks that they will be taking if the case goes to trial. They will remind the parties of the likely costs of litigation. They may probe the parties' cases for weaknesses. It can often take some time for the parties to make concrete offers and mediations can continue until well into the night, unless the parties agree a cut-off time to impose a sense of urgency from the start.

Mediation is about involving the parties directly in the dispute resolution process and, in the private sessions, the mediator will usually try to engage primarily with the party's representative rather than the lawyers. They may also encourage the parties to negotiate directly, with no one else present. If the party's representative and the lawyer have prepared properly for the mediation, this should not be a difficulty.

Who should attend?

The parties can decide on who they wish to attend, but it is usual to have at least one representative of the party and the party's solicitor in attendance. In complex cases, barristers and experts may also attend. Each party does need to be represented by a person having authority to settle the dispute on the day, although that authority need not be for the full amount of the claim.

How to prepare

Preparation is essential to achieve a successful outcome at a mediation. Parties need to be fully advised by their lawyers on their prospects of success in any proceedings and the attendant risks, including possible cost consequences both in the event of success or failure in the litigation process. Armed with that risk analysis, the parties must consider what range of possibilities would be acceptable to them as a settlement. Although parties should approach mediation with an open mind, a well-advised client will not lose sight of the analysis of the dispute carried out beforehand with its legal advisers.

Why not mediate?

There are some cases where it is generally considered mediation will be inappropriate. For instance, where a legal or commercial precedent needs to be set, where the parties require emergency relief that can only be given by a court injunction, where there are allegations of fraud or where, for whatever reason, the parties wish to publicise their dispute. The courts have indicated that they do not consider the fact that a dispute is complex or that it involves a point of law to be good reasons not to agree to participate in a mediation.

Do I have to mediate?

Technically, unless you have contracted to do so, the answer is no - but you must think very carefully about turning down an offer to mediate, and have a good reason for so doing. Court rules actively encourage the parties to consider using a form of alternative dispute resolution, which includes mediation. There may well be cost penalties imposed by the court for not agreeing to mediate.

If the parties have a contract, the court will enforce a properly drafted term providing that the parties will submit their dispute to mediation before going to court. The obligation to mediate must be expressed in unqualified and mandatory terms.

Can a court order the parties to mediate if they don't want to? At present the position remains that the court cannot compel parties to mediate.

However, courts can robustly encourage the use of mediation through the use of cost sanctions. The usual rule on the award of legal costs is that if a party is successful at trial, it is entitled to recover its costs from the losing party. There have been a number of cases where the losing party at trial has successfully argued that it should not pay the winning party's costs because the winning party had earlier unreasonably refused to mediate the dispute. Relevant factors on whether there has been an unreasonable refusal will include the stage in the proceedings when the proposal to mediate was made and whether other settlement methods were attempted. A failure to respond to an offer to mediate will be interpreted as an unreasonable refusal to mediate.

Is mediation going to become compulsory in the future? Well, the prospect of mandatory mediation does appear to be on the horizon. In July 2021, the Civil Justice Council published its report on compulsory ADR. The report concluded that the introduction of further compulsory elements of ADR, including mediation, to promote the resolution of civil disputes would be lawful and "potentially an extremely positive development". For now, mediation remains the choice of the parties, subject to the possible costs sanctions by the courts if there is an unreasonable refusal to mediate.

Conclusions

Mediation is a common feature on the legal landscape and has been for some time. Parties who find themselves with a dispute on their hands will have to consider whether they should try to settle their differences by mediation.

Sophisticated litigants and those with the benefit of advice tend to be well aware of the benefits of mediation.

Many disputes tend to have a "right time" to settle. The circumstances and point in time vary from case to case. Given the high success rate of mediations and their ability to preserve commercial relationships as well as save substantial time and costs, parties should consider the possibility of mediating disputes they encounter.

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