



HERBERT
SMITH
FREEHILLS

A PRACTICAL GUIDE TO MEDIATION

November 2012

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1. What is mediation?

Mediation is a form of Alternative Dispute Resolution (ADR). ADR refers to dispute resolution processes that do not involve court or arbitration proceedings. By far the most common of these is mediation.

Mediation is a confidential process whereby an independent and neutral third party (the mediator) is appointed to help the parties reach a negotiated settlement. The mediator does not act as a judge, and has no power to make binding decisions, but will explore options for settlement with the parties. Mediation can, in principle, be attempted at any time in the dispute cycle, whether before or after formal court or arbitration are commenced, or in conjunction with them.

2. What are the primary advantages of mediation compared to litigation or arbitration?

The most obvious benefits are speed of resolution (most mediations last one day and can be set up within weeks), confidentiality, potential cost savings in both legal and management time, the possibility of maintaining business relationships, and the wide range of potential outcomes (mediation can result in any terms that suit the parties unlike court orders which are limited to assessing technical legal rights).

A further advantage of mediation is that it is a flexible and informal process and can be conducted between parties with or without lawyers present. The extent to which lawyers are involved is largely subject to the will and confidence of the parties. Mediation can be a useful forum for direct communication between parties; in fact it is often the case that the more active the client is at the mediation, the more effective the mediation is.

3. What is the role of the mediator?

The mediator controls the process and encourages open and honest communication between the parties. However, he has no power to make an order for the production of documents or to make a final determination. As such, the parties remain in charge of the outcome and they must reach an agreement themselves and sign a written settlement agreement in order to be bound. Until such agreement is reached the parties are free to walk away from the mediation.

4. When can you use mediation?

In very simple terms, if you feel in a position to negotiate a dispute, then you can mediate it. The 'right' time to mediate will depend on the circumstances of the case. The key is having sufficient information to make sensible decisions about possible settlement options. In many cases, this will be after the exchange of initial correspondence and documents about the dispute. For some larger cases, it may tactically be better to hold off until there has been more substantial disclosure of documents.

Getting the timing right requires careful judgement. Generally speaking, the earlier you mediate, the greater the likely savings in legal costs and management time. An earlier mediation will also have a greater chance of preserving a party's reputation, given that the process is private and confidential. However, mediation may be unproductive if suggested too early, as initial hostilities may prevent the parties communicating effectively. A lack of information on the dispute may also be a considerable barrier to an effective mediation process.

5. What types of cases can be mediated?

Mediation is suitable for most types of disputes. Historically cases involving allegations of fraud were thought to be more difficult to mediate due to the nature of the allegations but in practice many fraud disputes are mediated successfully.

In certain cases, it may be desirable to set a precedent to assist the parties in their future dealings, in which case a binding judgment may be needed. If you need a swift interim remedy, such as an injunction to prevent certain behaviour (say the dissipation of assets), mediation would also not be appropriate at least until the interim remedy is obtained.



6. How do you propose mediation?

It used to be considered a sign of weakness to suggest mediation. However, times have moved on and the courts actively encourage parties to engage in mediation before and during litigation. Some legal systems (notably Italy, China and some states in the USA) require litigating parties to attempt mediation before or during litigation. The English courts require an explanation of whether ADR has been considered at various points in the dispute cycle, and judges have the power to impose cost sanctions against parties who unreasonably refuse to mediate. Many large organisations now have policies that require them to consider and/or use mediation in all appropriate cases. These factors can be used as a basis for suggesting mediation to your opponent.

7. How is a mediator appointed?

If a proposal to mediate is accepted, the parties must then agree the appointment of a neutral to act as a mediator.

In most jurisdictions there are generally two methods for doing this: either through an ADR/mediation service provider which monitors the performance of the mediator or through agreement of the parties to appoint and instruct an independent mediator.

Mediator fees vary widely but in large commercial disputes, mediation costs are usually insignificant compared to the parties' costs and the sums in dispute. Mediation costs are usually shared between the parties pursuant to the mediation agreement, regardless of the outcome of the dispute.

8. What does the mediation process involve?

Before the mediation

The parties will usually exchange short position papers 7-14 days before the mediation setting out their cases. It is also usual for the parties to agree a core bundle of documents for use at the mediation.

The mediator will generally wish to speak to the parties (or at least their advisers) before the mediation day. The purpose of the discussion will be to ensure that the mediator has a complete understanding of the case and the main points of contention that need to be resolved.

At the mediation

Mediations may last anything from a few hours to several days in complex multiparty disputes. Most commercial mediations last one or two days. The process is entirely flexible. However, the following format is often adopted.

The Opening Session

The mediator will start the day with informal introductions in the parties' private rooms. If the mediation agreement (the basic document governing the process) has not yet been signed, this will also take place and is a formality.

The mediator will then ordinarily begin the process with a joint meeting involving all parties. At this initial plenary session the mediator will establish ground rules for the day, reaffirming the strict confidentiality of the mediation and asking each party to respect the other side's right to be heard during opening presentations.

The mediator will ask each party to make an opening statement. This statement is generally no more than about 10-15 minutes long and is used to present the key issues that make up the case.

The presentation can be made by the lawyer or business principals or a combination of the two. This opening session may be the only time during the day when all parties are together in one room. It is therefore important to make good use of this time with the decision makers on the opposing side. Formal courtroom advocacy is rarely effective – this is an occasion for business negotiation.

Private meetings (or caucuses)

Following the joint meeting the mediator will conduct a series of private meetings (sometimes called caucuses) with each party, seeking to learn more about each party's expectations and to test the parties as to the strengths and weaknesses of their case. It is critical to note that nothing said in these meetings is passed to the other party without your specific authority for the mediator to do this.



It is likely that the mediator's first private sessions with you will be "exploratory" in nature, seeking to get a better understanding of the issues that separate the parties and their underlying interests (commercial, reputational, emotional etc). You can best assist the mediator by defining your issues clearly and ensuring that he/she understands your position. You can expect the mediator's questions to be probing – seeking to expose potential areas of weakness in your position. This is normal and the mediator will likely be doing the same with the other party.

In the course of the day the mediator will encourage the parties to move towards making offers and counter-offers. The approach will be informed by what has been learned during the day and, depending on the case, there may be scope to explore non-monetary traded solutions as well as a financial resolution.

It is through this process of private meetings (known as "shuttle diplomacy") that the mediator aims to bring the parties towards settlement.

Further joint meetings

It is quite common at some point in the mediation – typically later in the process – for the mediator to encourage the business principals to engage in direct discussions, without their legal advisers. This can be effective particularly as the final steps in a settlement need to be taken.

Settlement

If a settlement is reached, the lawyers present will draw up a settlement agreement. It only becomes a binding document once it is signed by all the parties. If no lawyers are present, the mediator generally helps with the drafting.

Non-settlement

In the event of non-settlement the mediator will generally ask permission to stay in contact with the parties, as often settlement will be achieved in the following weeks or months. Otherwise the parties retain the ability to pursue their rights either through litigation or arbitration as appropriate, following an unsuccessful mediation. Anything said or done or any documents created for the purpose of the mediation are 'without prejudice' and, except in very limited circumstances, cannot be relied upon in subsequent litigation or arbitration.

9. Conclusion

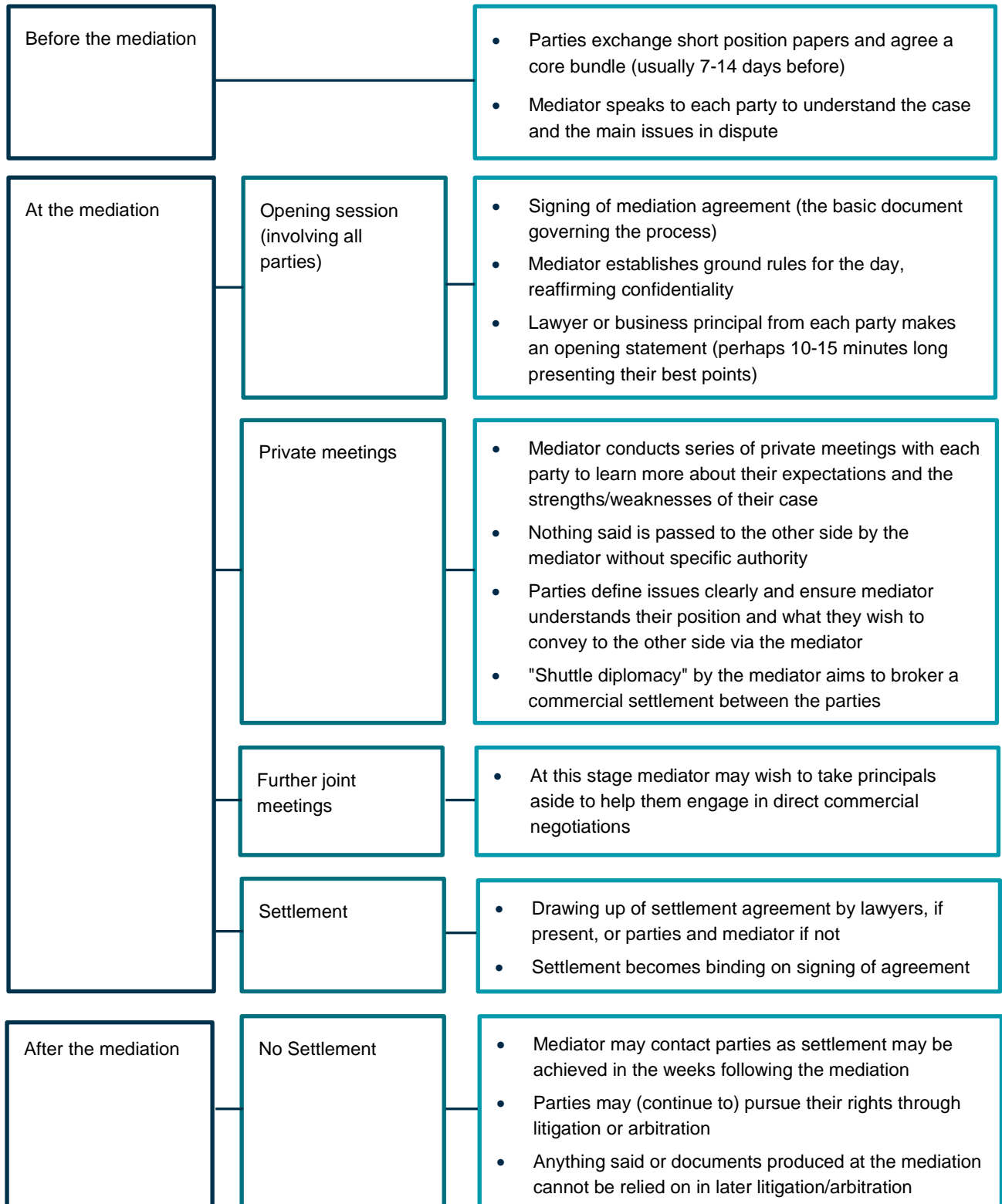
To get the most out of mediation it is essential to keep in mind the goal to achieve a settlement acceptable to both parties.

To learn more about how corporates use ADR, see [The inside track – how blue-chips are using ADR](#) and our [ADR Toolkit](#).



The mediation day

The process is entirely flexible but the following format is often adopted:





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October 2012

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