

MATA

Mediation and Training Alternatives

MEDIATION OVERVIEW

WHY MEDIATION?

There is one crucial factor that makes commercial mediation different from most other forms of dispute resolution. **No-one tells the disputing parties who is right and who is wrong.**

Anyone who has been involved in disputes will recognise that the parties invariably interpret the same facts and events differently. They see them through eyes that are conditioned by education, culture, age, environment and a host of other factors. However, just because their interpretation is different it does not mean that they are more right – or more wrong – than the other party; that is what makes any adjudicative process (courts, arbitration, adjudication, even expert determination) an inherently flawed way of resolving disputes. Add to that the fact that arguments in court and arbitration are restricted to the applicable law, and that settlements are invariably restricted to money, and the injustice is compounded. Not to mention the time and cost of getting to such a settlement.

That is why mediation is so effective in achieving solutions that meet the needs of both or all the disputing parties.

WHAT IS MEDIATION?

Mediation is essentially an assisted negotiation. Direct negotiation between the parties is the most efficient way of resolving disputes, but if this breaks down the next best option is to involve a neutral third party.

The generally accepted description of commercial mediation is that it is:

a voluntary, non-binding, private dispute resolution process in which a neutral person helps the parties to reach a negotiated settlement.

Unless mandated by the courts or required by a condition of contract, parties attend a mediation **voluntarily**. That is usually a powerful first step towards settlement, and most experienced mediators expect 80-90% of the disputes they mediate to settle on the day. Indeed, agreeing to mediate may be the **only** thing that the parties agree on prior to the mediation!

Mediation is **non-binding** until the agreement is put in writing (when it becomes binding as any contract in law). This means that the parties can try out anything in an attempt to find an acceptable settlement, discarding ideas and trying others, without being committed unless and until they find something that works.

Key to any mediation is the fact that it is **private**. Whatever is said in open or private meetings remains confidential and cannot be shared outside the mediation unless all parties agree. This enables the parties to talk frankly about the strengths and weaknesses of their, and the other's, case without it prejudicing their position if the matter does not settle and then proceeds to court.

The mediator is **neutral** and her/his only interest is in providing the parties with their best chance of achieving a settlement to their dispute, by creating the right environment, asking the right questions and building an atmosphere of trust.

One of the key strengths of mediation is that the parties take control of the outcome and **negotiate their own settlement**. The settlement may take into account any number of non-financial factors and needs that are impossible in other dispute resolution forums.

WHAT HAPPENS AT A MEDIATION?

Most mediations last one day, some more complex (especially multi-party) disputes may take longer but it is very rare to exceed three days. This really challenges the parties to focus on the key issues in dispute and to set aside the finer detail that often diverts their energies and leads to deadlock.

There will be some pre-mediation contact by the mediator with the parties or their lawyers, mainly to ensure that parties are comfortable and that all will go smoothly on the day. The day itself will normally start with an open meeting where each party will present their position on the issues to be resolved and that will lead to questions and discussion.

There will then be a series of private meetings between the mediator and each party, and the day will continue with combinations of private and open meetings until a resolution is achieved.

The settlement agreement will then be put in writing and signed by each party.

WHAT DOES THE MEDIATOR DO?

The first role of the mediator is to provide the best forum for the negotiation. This includes choosing the venue, deciding and managing the structure of the day, ensuring that the right people attend, that refreshments are available and any individual needs (eg smoking, access, diet) are identified and met.

Next, the mediator has to build a relationship of trust and empathy with everyone in a very short time, so that when difficult issues are addressed the parties are able to be frank with the mediator and not feel threatened.

The mediator manages the framework of the day but ensures that the parties retain responsibility for their problem and for its resolution. The mediator will help

parties avoid, or overcome, deadlock so that they can concentrate their energies on negotiating a deal.

In summary, a skilled mediator will:

- Restart negotiations that have stalled
- Reopen communications between parties
- Bring a fresh, neutral pair of eyes to an old problem
- Help parties take a broader perspective and explore creative solutions
- Help parties move toward a realistic, negotiated settlement.

Quickly and cost-effectively.

WHY MEDIATION WORKS

Mediation is effective because the mediator is an independent neutral who is committed to helping the parties settle, but who does not have a stake in the dispute or the outcome. S/he acts as a catalyst in an otherwise stalled negotiation.

This powerful dynamic:

- Gets the right people around the negotiating table
- Helps parties look more objectively at their problems
- Identifies the real issues and needs of the parties
- Helps overcome emotional blockages
- Moves the focus from detailed legal argument to a commercial agenda
- Keeps ownership of the problem and its resolution with the parties
- Encourages parties to regularly reassess their case
- Moves parties away from the past to facing the future
- Encourages the parties to co-operate in finding a solution that meets their needs
- Often increases the options for settlement
- Can preserve or restore relationships.

In traditional methods of dispute resolution, particularly litigation and arbitration, parties are often faced with the prospect of a long and expensive process that demands excessive management time and other wasted resources. That is why mediation, and some other dispute resolution processes, is still called **Alternative** Dispute Resolution (ADR) because it offers a cost-efficient and credible alternative to the traditional methods, and also returns power to the parties. Around nine times out of ten a settlement is achieved, so parties can be optimistic about the outcome. The question therefore is not “Is this case suited to mediation?” but rather “Why is this case **not** suited to mediation?”.

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