



PREPARING FOR MEDIATION

This is the fifth in our series of **ADR practical guides**, designed to provide clients with essential practical guidance on various processes falling under the banner of 'alternative dispute resolution' (ADR), with a particular focus on mediation.

This guide highlights issues that parties preparing for mediation should turn their minds to before the day, to maximise the effectiveness of the process.

A mediation often represents the best opportunity the parties have before trial to resolve their dispute, so effective preparation is key to ensuring that the mediation is as constructive and effective as possible. Good preparation greatly improves the prospects of achieving a settlement; inadequate preparation can easily prevent the day from being worthwhile and can even undermine commercial representatives who commit time to the process only to see it founder on issues that could have been anticipated.

There are two key questions that parties preparing for mediation should ask themselves throughout their preparation for the mediation:

- First, how to remove **obstacles to settlement**: parties should do all they can to avoid the negotiation at the mediation being delayed, or failing, because there is an issue that could have been identified and addressed in advance that was not.
- Second, what will **the other side** need to help them take a decision to resolve the dispute? It is easy in the flurry of activity before a mediation for each party to focus only on their own case and preparation, but a resolution will only be achieved with the agreement of the counterparty, so keep in mind your opponent at all times (even if you disagree as to the approach they appear to be taking).

Effective preparation will usually involve consideration of the following key principles. Not all of these carry equal weight in every mediation, but they represent a good checklist of issues and questions against which to benchmark your preparation.

PRE-MEDIATION PREPARATION

The more complex your dispute, the more value there will be in focussing on preparation early and ahead of the mediation. Consider whether a pre-meeting or conference call before the mediation would be helpful, with or without the mediator to assist. The sorts of issues that the legal representatives should consider include:

- Who will attend the mediation with authority to settle? Will there be sufficient parity of decision makers in terms of status in respective organisations; are third parties interested in the outcome (insurers, others providing financial support to one or more parties)?
- What information or documents will the parties need to reach a resolution? For example, are there technical issues that require some specific input for the mediation but outside a court or arbitration timetable?
- How will quantum be addressed? The natural focus of the parties before a mediation is often on issues of liability, but the resolution will usually require at least some information on quantum, frequently before the parties have addressed the issue in detail in litigation or arbitration.
- The venue for the mediation can be a cause for debate between the parties. In practice, there is usually little difference in the mediation taking place on so-called "neutral" territory as opposed to the offices of one of the party's legal representatives provided appropriate space and facilities are available.
- How are the costs of the mediation to be borne? These will include the parties' own legal costs of preparing for and attending the mediation and the parties' respective shares of the mediator's fees (and any venue fees). In the event of an unsuccessful mediation, are they to be treated as costs in the case or is some other (and if so what) arrangement to be agreed?

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If one or more parties are resistant to engaging on these issues, enlist the mediator's assistance to propose and lead the discussion on these topics as matters which they, and the mediator, will need to understand. A few hours of thought in advance of the mediation can save money and avoid frustration and delay at the mediation itself.

UNDERSTAND THE STYLE AND LIKELY APPROACH OF THE MEDIATOR

Once the mediator has been selected a key aspect of preparing for the mediation will be to gain an understanding, in so far as possible, of the style and approach of the mediator. This may have a significant bearing on the manner in which the mediation progresses. Most experienced mediators can adapt their style to suit the parties' wishes - so engage in discussion with the mediator, usually in advance, on what is likely to be helpful in your view and why.

While the mediator may, from the papers or personal style, be inclined to focus on certain issues, be they commercial, technical or legal, it is the parties that "own" the mediation process so they should actively express views so that they can be taken into account by the mediator and addressed to avoid any surprises at the mediation itself.

Seek to build rapport with the mediator at an early stage and ideally starting in pre-mediation discussions. The mediator is an ally to both parties in that his or her role is to assist them in reaching settlement; hostility towards the mediator by the parties or the legal representatives, while sometimes observed, is rarely effective. Understanding the mediator's style and approach can also influence the mediation strategy (as addressed in more detail below) so that the mediator's strengths are used most effectively to help you persuade your opponent to settle at an appropriate level.

UNDERTAKE AN APPROPRIATE RISK ASSESSMENT

It is essential to undertake a risk assessment. Whilst this may be difficult, particularly if the mediation is taking place at an early stage in the proceedings, it is very difficult to develop an appropriate negotiation strategy without:

- a critical analysis of the respective merits of the parties' legal and factual positions
- ensuring that there is sufficient information available with respect to quantum issues
- giving detailed consideration to the underlying commercial or other interests of both parties and how those interests may impact not only on the negotiation strategy of each party but also where any ultimate settlement is likely to be focused
- preparing a proper analysis of the costs of the litigation (incurred to date and future) and identifying the likely irrecoverable element of costs

DEFINE A NEGOTIATION STRATEGY

In order to ensure that the time at the mediation is used as effectively as possible a negotiation strategy should be planned in advance. Whilst it will not be possible to consider every possible move in the negotiation (and it is important to be flexible on the day of the mediation and not become wedded to the devised strategy) it will be helpful to consider the following:

- the level of initial offers and how those relate to the issues in dispute and the merits of making the first offer
- anticipated counter-offers
- commercial bargaining positions of the parties
- non-financial elements of any offers (for example, apologies, public statements, confidentiality undertakings, future joint ventures/relations)
- range of potential settlements including what you (and your counter-party) are likely to be prepared to offer and, eventually, settle for - in other words a settlement range which would be desirable but, more usually, acceptable
- economic or reputational issues in the event that a settlement is not achieved

Any strategy should also take account of the personalities and potential personal involvement of the individuals who will be attending and representing each party at the mediation as it may be necessary to take proper account of and deal accordingly with such issues in the way the strategy is formulated or presented.

In addition it is sensible to explore cost effective ways in which settlement might be effected. This may involve investigating whether there are tax efficient ways of structuring a settlement. If that is the case it may be necessary to seek tax advice prior to the mediation and have contact details for a tax adviser on the day of the mediation.

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ATTENDANCE AT THE MEDIATION

The individuals on behalf of each party who attend the mediation in order to conduct or facilitate the negotiations need to understand the process and their roles so that they can play their part effectively. Bear in mind the following:

- an individual on behalf of each party who is a decision maker with authority to settle the dispute must attend - it will be important to obtain assurance that the individuals attending on behalf of the counter-party have the necessary authority to settle the dispute on the day
- it may be helpful to have other members of senior management attend in order to ensure that each party understands that the mediation represents a key opportunity to settle the dispute and is being taken seriously
- in general, the more extensive the role that commercial representatives and decision makers can take the better. But ensure that those individuals are prepared in advance and understand the issues and the implications of taking positions on the day. The discussions at the mediation can also be confrontational (and, in some disputes, emotional), so prepare those representatives to expect the opponent to use the process as catharsis and listen or respond appropriately
- it is usually beneficial if individuals at each party of a comparable level of seniority attend which ensures that each party sends a constructive message as to the purpose of the mediation
- it may be of assistance to have individuals who are able to assist with particular technical or other factual matters that form a substantive part of the dispute - but make sure the mediation does not turn into a rehearsal of any trial. Technical and factual witnesses are there to assist the negotiation, not to try to take over the process
- in the event that key individuals are unable to attend it is important that they be contactable during the mediation, including out of hours numbers for them in the event that the mediation continues in to the evening

PREPARING THE POSITION STATEMENT OR WRITTEN SUBMISSIONS

The written position statement is the opportunity for each party to set out its primary position in relation to the issues that are likely to arise for discussion at the mediation. Its primary purpose is to explain the case to the opposing decision maker(s) and to persuade them why they should seek to resolve it. As such, the written statement presents a valuable opportunity to speak directly to the decision makers, who will almost certainly read it for themselves.

Since the decision makers are frequently commercial rather than legal representatives, it is unlikely that position statements resembling skeleton arguments for trial and containing detailed submissions on the law will be effective. Effective position statements typically tell a narrative of the dispute in an accessible way, help the opponent to see the dispute in a different way (or at least understand that there are different ways of viewing the issues) and explain why (and how) they face risks if the dispute continues.

The position statement will also assist the mediator in his preparations but if there are particular matters that a party wishes to explain to the mediator then these can be addressed in private conversations or by way of an additional, separate confidential mediation position statement which is prepared for the mediator's eyes only.

PREPARING FOR THE OPENING STATEMENT, PRIVATE SESSIONS AND BEYOND

As with the written statement, the opening statement (assuming that the mediation commences with a joint (or plenary) session with the parties together in the same room with the mediator) presents an opportunity for each party's representative to present the case from that party's perspective.

It is, therefore, important that the tone and content of the statement is appropriate and enables the key messages to be communicated clearly and effectively. Opening statements are usually kept to a short time limit and it is important to ensure that the statement achieves the desired aim - whether that is simply to reinforce the fact that attendance at the mediation is a sign of the seriousness with which the party is taking the opportunity to settle. It may be necessary to address difficult issues head on, but inflammatory language is unhelpful. Where counter parties are not native speakers of the language in which the mediation is being conducted, choose your language carefully using internationally understood terms and avoiding slang or local idioms which may not be understood as they are intended.

Consider whether visual aids or other presentational tools may assist. This is particularly the case in the event that the dispute concerns detailed technical issues, where a picture, diagramme, PowerPoint presentation or even an animation or film can achieve more than words.

As for who should give the opening statement, it is often more effective for the principal commercial representative to do so (if they are willing to), supported as necessary by their in house or external legal advisers. It will be

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necessary to prepare for this with a script or at least some points to speak to and it is worthwhile rehearsing the opening session if time permits.

It is also important for commercial and legal representatives to prepare for potential confrontation, aggression or emotion on the part of the counter-party and to anticipate how best to deal with such behaviour rather than being unsettled or embarrassed by it at the mediation itself. Understand the importance of listening respectfully and attentively to the other party, without interruption. It may be difficult to listen to matters with which you are likely to disagree but part of the mediation process requires that each party respects the other party's position.

After the plenary session the mediator may (and often does) spend time with the parties in private sessions engaging in shuttle diplomacy. But as the negotiations progress it is common for mediators to propose that principal commercial representatives meet together without their lawyers. Since these discussions are often the critical points in the negotiation, it is good practice to ensure that the commercial representatives are prepared in advance (so far as possible) for such situations and that, when the mediator proposes such a meeting, the parties take a few moments to collect their thoughts and prepare for that stage of the negotiation having reflected on the progress they have made so far.

If the mediation does not achieve a settlement on the day(s) of the mediation itself, it is important that the commercial representatives understand the value in maintaining contact with their counterparts even after the mediation. Often progress made at the mediation and lines of communication that are (re)established provide the opportunities for subsequent discussion and negotiation in the following weeks or months to reach a settlement that was originated or shaped at the mediation but could not be concluded on the mediation day for a range of reasons.

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