



# AN INTRODUCTION TO MEDIATION – WHAT IT IS AND HOW IT WORKS

This is the second 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 provides a high level introduction to mediation, by far the most commonly used ADR process. It is intended to assist in-house counsel, claims handlers and business representatives who are required to participate in a mediation.

## WHAT IS MEDIATION?

Mediation is a confidential process in which an independent and neutral third party (the mediator) is appointed by the parties to help them reach a negotiated settlement of their dispute, principally through structured settlement discussions. The process can be conducted before the commencement of formal legal or arbitration proceedings or alongside such proceedings.

The mediator does not act as a judge and has no power to make binding decisions. Rather, he or she will explore options for settlement with the parties and attempt to broker a deal between them.

The key goal of mediation is to reach a settlement that brings the dispute to an end on terms that are acceptable to both parties – not to determine the parties' legal rights or arrive at the 'correct' legal position.

## WHAT ARE THE MAIN ADVANTAGES COMPARED TO LITIGATION OR ARBITRATION?

The most obvious benefits are:

- **speed** - most mediations last one day and can be set up within weeks
- **flexibility and informality** - the extent to which lawyers are involved (if at all) is largely subject to the will and confidence of the parties. In fact, it is often the case that the more direct communication between the clients at the mediation, the more effective the mediation
- **cost savings** resulting from the above - in both legal expenses and management time
- **confidentiality** - 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
- better chances of **preserving business relationships** due to the conciliatory nature of the process
- the **range of potential outcomes** - mediation can result in any terms that suit the parties, unlike court orders which are limited to particular legal remedies

## WHAT IS THE MEDIATOR'S ROLE?

The mediator controls the process and encourages open and honest communication between the parties. However, he or she 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.

The style of mediators can vary along a continuum from pure 'facilitators' (who assist the parties in their negotiations) to 'evaluators' (who encourage settlement by expressing views on the merits and likely outcomes).

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## AT WHAT STAGE IN A DISPUTE 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 - and getting the timing right requires careful judgment.

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.

Generally speaking, the earlier you mediate, the greater the likely savings in legal costs and management time. An earlier mediation (before court proceedings are commenced) will also have a greater chance of preserving a party's reputation, given that the process is private and confidential. However, mediation may be less productive if attempted too early, particularly if a lack of information prevents the parties assessing the merits of the case in a meaningful way. For more on timing issues, see our [ADR practical guide No. 3: 'When to mediate in the dispute cycle'](#).

## 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 court judgment may be needed. Also, 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.

## HOW DO YOU PROPOSE MEDIATION?

It used to be considered a sign of weakness to suggest mediation. However, times have moved on and many organisations large and small are now more familiar with the mediation process and its benefits.

The English courts actively encourage parties to engage in mediation before and during litigation and require an explanation of whether ADR has been considered at various points in the dispute cycle. Judges have the power to impose cost sanctions against parties who unreasonably refuse to mediate. Some legal systems (notably China and some states in the USA) require litigating parties to attempt mediation before or during litigation. 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 - as well as all the advantages of mediation noted above.

## 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, this can be done either:

- through an ADR/mediation service provider, which monitors the performance of the mediator; or
- through the parties agreeing to appoint and instruct an independent mediator.

Mediator fees vary but in large commercial disputes mediation costs are usually insignificant compared to the parties' other costs and the sums in dispute.

For a discussion of factors to consider when choosing a mediator, see our [ADR practical guide No.4: 'Appointing a mediator and drafting the mediation agreement'](#).

## WHAT HAPPENS ON THE DAY?

### Before the mediation

Once the parties have agreed to mediate they will enter into a mediation agreement which sets out the minimum procedural framework for the process: when, where, who attends with authority, confidentiality and costs. (See our [ADR practical guide No.4: 'Appointing a mediator and drafting the mediation agreement'](#).)

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 sufficient understanding of the case and the main

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points of contention that need to be resolved. For an overview of matters the parties should consider prior to mediation, see our [ADR practical guide No.5: 'Preparing for mediation'](#).)

## 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 starts the day with informal introductions in the parties' private rooms. If the mediation agreement 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 confidentiality of the mediation and asking each party to respect the other side's right to be heard during opening presentations.
- The mediator will usually ask each party to make an opening statement - which can be made by the lawyer or business principals or a combination of the two. This statement is generally no more than about 10-15 minutes long and is used to present the key issues that make up the party's case.
- 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)

- The mediator will then 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 specific authority for the mediator to do this.
- It is likely that the mediator's first private session(s) with each party 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. Expect the mediator's questions to be probing - seeking to test the strengths and weaknesses in your case. 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 often 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 critical final steps in a negotiated settlement need to be taken.

### Settlement

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

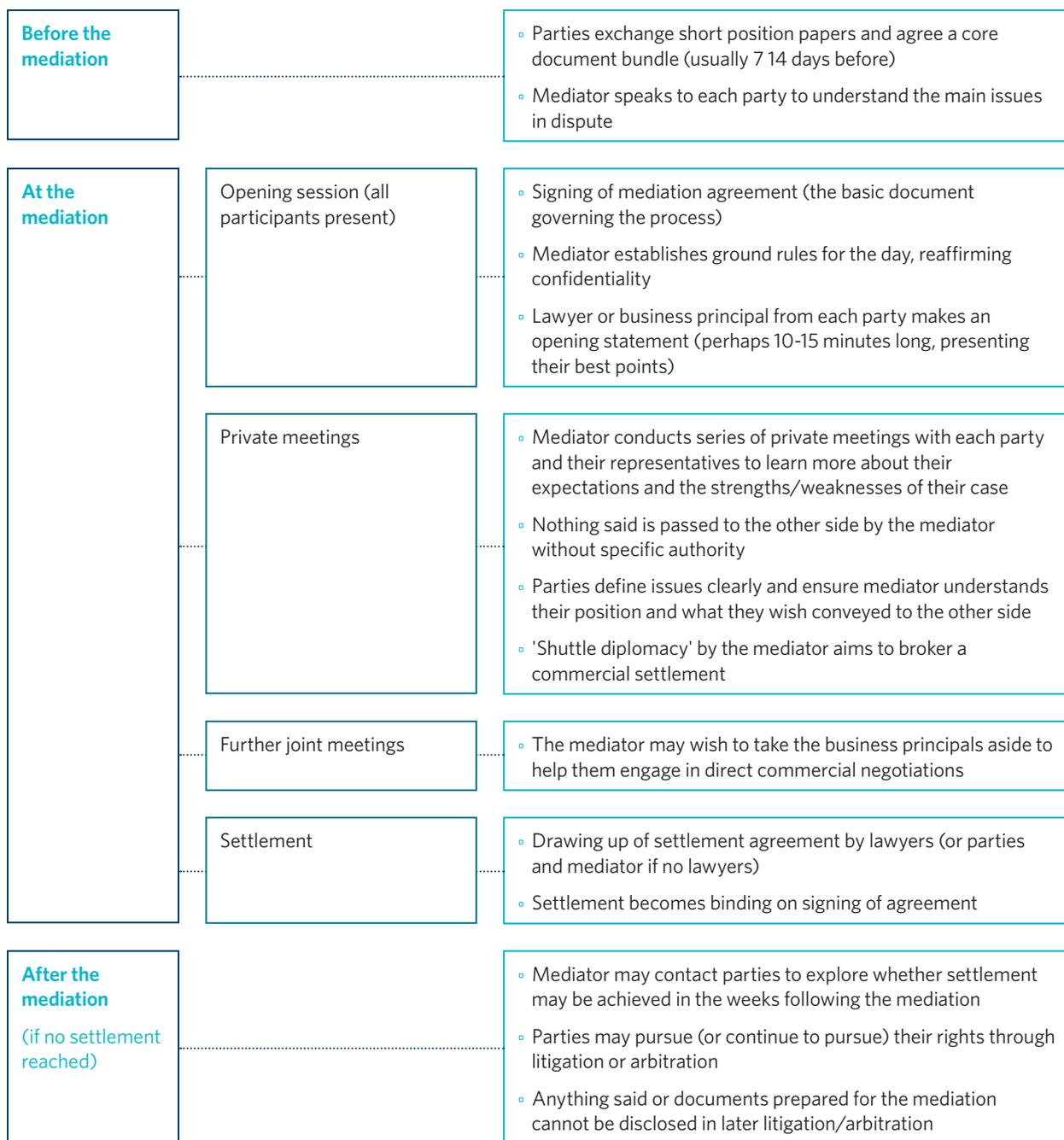
### No settlement

- If no binding settlement is achieved, the parties retain the ability to pursue their rights either through litigation or arbitration as appropriate.
- However, the mediator will generally ask permission to stay in contact with the parties, as often settlement can be achieved in the following weeks or even months.

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## MEDIATION TIMELINE

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



## KEY CONTACTS



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