HERBERT SMITH FREEHILLS
DISPUTE RESOLUTION

ADR PRACTICAL GUIDE SERIES

NO.3

WHEN TO MEDIATE IN A DISPUTE

This is the third 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 sets out a series of factors and questions to consider in identifying suitable opportunities to mediate in the lifecycle of a dispute, recognising that, in general, the earlier a mediation takes place, the earlier the opportunity reach consensual resolution and control costs.

INTRODUCTION

Although there is sometimes discussion about the 'right' time to mediate a dispute, in reality mediation can be undertaken effectively at a number of stages in the lifecycle of most disputes. What is necessary is that the parties should understand the different dynamics at play in the dispute at different stages (some of which will be generic, some case specific) and tailor their expectations, preparation and negotiation strategy accordingly.

It is self-evident that early mediation is desirable if it can be conducted effectively, given the greater potential savings of legal costs and management time, reputational benefits arising from a confidential process and potential to preserve business relationships by avoiding a protracted adversarial litigation process.

However, the earlier a mediation takes place, the less information the parties will usually have to enable them to come to an appropriately informed decision to settle. Most decision-makers would, naturally enough, prefer to take a decision to settle with full information, but the costs (not just economic costs) of obtaining that information through the litigation process may be unacceptably high.

There is, therefore, an inherent tension which the parties should recognise. It is best addressed by focussing on what information is truly necessary to enable the relevant decision-makers to act with reasonable prudence and how that information can be provided most efficiently (either through or in parallel with the litigation process). The balance of this guide sets out factors and questions to consider in testing what is the earliest occasion a mediation can take place effectively and whether the parties have enough information to proceed. It is important to recognise in this context that mediations can be 'successful' even if the entirety of a dispute cannot be resolved (see below for examples). Consequently, this is a discussion about 'when' not 'if' to mediate – the range of factors to consider in refusing mediation and the potential adverse costs consequences of doing so are outside the scope of this guide.

FACTORS INFLUENCING THE DECISION MAKING PROCESS

External factors

Court rules: Pre-action protocols and the Practice Direction on Pre-action Conduct	▫ Require early and serious consideration of ADR but do not compel parties to mediate – the Civil Procedure Rules (CPR) and the courts recognise the benefits of early mediation ▫ Failure to respond to a mediation proposal or unreasonable refusal to mediate can have adverse costs consequences (true at all stages of litigation)
Agreed dispute resolution process	▫ Are there applicable contractual provisions that mandate ADR? If so, these will have to be observed if they are effective and enforceable

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Court order	▫ Once proceedings are under way, the Court can stay proceedings of its own initiative for the parties to engage in ADR ▫ It is standard that the Court will propose a window within which ADR should be attempted when setting procedural directions for the conduct of civil litigation ▫ A party unwilling to accede to ADR may be ordered to file a witness statement setting out the grounds of refusal (on a 'without prejudice save as to costs' basis) for later consideration in the context of costs

Case specific factors

Extent of knowledge and understanding about the case	▫ Is there a minimum level of clarity on the: - issues in dispute - quantum - relative merits of the parties' cases to enable the parties to be clear what dispute(s) they are trying to resolve and to enable a meaningful risk assessment to be carried out on whether to settle or fight the case? Bear in mind the mediation process will itself assist the parties to develop this understanding
Costs	▫ What are the likely overall costs if the matter proceeds to the end of trial (have cost budgets been prepared and filed)? ▫ What proportion of those costs would be irrecoverable for a successful claimant awarded its costs on the standard basis? ▫ What will be the most expensive stages of the litigation process, how much will they cost and when will they occur both for cash flow purposes and ultimate liability? ▫ What is the potential overall costs liability of an unsuccessful defendant subject to an adverse costs order?
Whether mediation has a realistic prospect of success	▫ 'Success' may not necessarily mean a final and binding settlement. Any of the following may be worthwhile outcomes: - Clarifying the factual and legal issues in dispute, their importance and the merits of the parties' positions; - Narrowing the issues by eliminating/resolving peripheral or irrelevant ones that it would be unnecessary or disproportionately costly to litigate; - Exploring the underlying interests and motives of the parties; - Focusing the attention of key decision makers on the issues in dispute and ensuring an early assessment of the associated risks - thereby increasing the prospects for a settlement after the mediation, even if settlement cannot be achieved at the mediation itself. ▫ How will the attitudes of decision-makers affect the prospects of success (recognising that some of these cannot truly be tested until a mediation takes place)? - How entrenched are they in their positions? - Are they reconciled to a compromised outcome? - Are there personal or emotional issues (including cultural expectations) which affect their ability to participate effectively? - Are they motivated by a desire for public vindication or another aim that is only achievable through a judgment of the Court?

ISSUES TO CONSIDER AT IMPORTANT PROCEDURAL MILESTONES

The following issues are set out to stimulate active consideration of the earliest effective opportunity to mediate in the lifecycle of a dispute destined for or in litigation.

Pre-action

- If pre-action protocols have been complied with and relevant documents produced by pre-action / third party disclosure, there will often be enough information to have a meaningful mediation.
- What is the attitude of the parties? Are positions too entrenched for there to be a realistic prospect of a mediation succeeding? Conversely, is there a continuing commercial relationship that can facilitate, and/or be better preserved by, a negotiated settlement?
- Would the parties benefit from early 'reality-testing' of their positions by a mediator?
- If mediation is not attempted, would issuing proceedings advance understanding of the evidence, facts or law and make a settlement more likely thereafter?
- Is there a compelling reason to issue proceedings without mediation? For example:
  - Imminent expiry of a limitation period;
  - A need for interim relief, such as an injunction.

Prior to / at the first Case Management Conference

- Has the understanding of the facts or assessment of the prospects changed since statements of case were filed and served?
- If mediation is not attempted now, will proceeding with the disclosure process make a subsequent mediation more likely to be successful? Will either party really find a 'smoking gun'? Would any increased chance of success really be justified by the likely costs of the disclosure exercise?
- Are there specific categories of documents that might greatly assist a mediation? If so, can the parties agree on a staged disclosure exercise aimed at prioritising these?

After substantial completion of disclosure

- Has the understanding of the facts or assessment of the prospects changed?
- Do the documents 'speak for themselves' and so permit a confident assessment of prospects to be made at a mediation? Or will factual / expert witnesses have truly important information to add which could alter the assessment and so point towards a later mediation?

After factual / witness evidence

- After the exchange of witness statements and (if relevant) expert reports, there should be no reason why mediation might not be productive, unless the parties have made a conscious decision not to mediate (because, for example, they require the Court's determination in a test case).
- Faced with an opposing party unwilling to mediate, a party proposing mediation should ensure it has given thought to appropriate costs protection mechanisms (eg, a Part 36 offer or a 'Calderbank' offer expressed to be 'without prejudice save as to costs') and has pressed the unwilling party to articulate its reasons for refusal. If no, or inadequate, reasons are provided, these will likely be relevant to costs submissions at the conclusion of the case.

During trial / post-trial

- The risks inherent in the trial, including the performance of witnesses, naturally mean that the parties will undertake an ongoing re-appraisal of the case as the trial proceeds. In long trials there may be opportunities to resolve the matter through negotiation including mediation.
- Whilst most of the costs of the action will have been incurred by the end of the trial, even then there may be significant commercial or reputational factors that make a negotiated settlement preferable to a judgment of the Court being handed down.
- Further, underlying commercial interests change and opportunities can arise. The parties should continue to consider whether there are outcomes that are not obtainable by a judgment alone, which might be preferable and remain in their control.

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SUMMARY

It is not possible, of course, for a guide of this nature to offer general guidance to litigants about when to mediate their particular dispute. It is hoped, however, that the issues set out prompt a more structured approach to the question of timing. See also our **ADR practical guide No. 5: 'Preparing for mediation'** which suggests how parties might approach preparation whether in early mediations or those conducted once the litigation process is well advanced.

KEY CONTACTS

Alexander Oddy
Partner, Head of ADR
T +44 20 7466 2407
alexander.oddy@hsf.com

John Ogilvie
Partner
T +44 20 7466 2359
john.ogilvie@hsf.com

Jan O'Neill
Professional support lawyer
T +44 20 7466 2202
jan.oneill@hsf.com

Neil Blake
Senior associate
T +44 20 7466 2755
neil.blake@hsf.com

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