



SELECTING YOUR MEDIATOR AND DRAFTING THE MEDIATION AGREEMENT

This is the fourth 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 identifies key factors to bear in mind when:

- selecting a mediator; and
- drafting or negotiating the mediation agreement that will govern how the mediation is conducted.

MEDIATOR SELECTION

Given the critical role played by the mediator in the mediation process, the selection of the mediator is a topic that attracts significant attention. While in some cases the parties (or their advisors) will have a specific mediator in mind or be content to engage a mediator proposed by one of the commercial ADR providers, the exercise of identifying suitable candidates is often more complex. This guide seeks to identify some of the key factors to consider in the selection process.

As to the process itself it is worth considering the following issues:

- There is no procedural fairness inherent in mediation as is the case with arbitration and so there is no difficulty in principle about speaking with mediators privately about a potential mediation appointment to gain an understanding of a mediator's approach to process and his or her personal style, which have an important influence on the process. Of course such discussions will necessarily be at a general level and a mediator would undoubtedly be careful to avoid expressing any views on a matter on which they were not formally appointed and without the benefit of significant detail.
- If the parties favour a more formal process and the dispute merits it, consider inviting potential mediators for a more formal interview or 'beauty parade', so that each party can ask questions and draw up a shortlist.
- A significant majority of commercial mediations are now arranged on an ad hoc basis, that is without the assistance of an ADR provider. While there are advantages to such an approach in some circumstances, one of the risks is that it is harder to obtain objective feedback on mediator performance. It would therefore be advisable to consult a range of sources including personal recommendations, any in house databases that log feedback on mediators, and internet based mediator search tools of which there are a number.

Practical experience and accreditation

In many jurisdictions there exist no formal requirements to be a mediator, be it initial training in the process or ongoing educational requirements. Whilst there are (rare) occasions where untrained mediators can assist parties in a meaningful way, consider the following:

- It is generally preferable that the mediator should have been trained by a reputable organisation to understand the process to international norms (recognising that mediation varies in style from jurisdiction to jurisdiction). It is important that mediators have a solid understanding of how confidentiality operates, particularly in private sessions, and a proper understanding of the process - which is rarely possible simply by having participated as a party or party representative in a number of mediations.
- Ask specifically about the mediator's practical experience as a lead or assistant mediator. While you will want to ensure that the mediator you select has sufficient practical experience, including experience of your type of dispute (where appropriate), consider using less experienced mediators for lower value or more straightforward mediations to build their experience and the pool of experienced mediators for the future.
- Consider asking for referees for the mediator to get insights into the strengths and weaknesses of the individual.

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Subject matter knowledge

The importance of a mediator having subject matter expertise is a hotly debated topic attracting a range of views. Consider the following:

- First, identify whether the dispute genuinely concerns specific industry or sector practice so that some specialist knowledge is necessary for the mediator to participate credibly in the process. The fact that an organisation operates in a particular sector does not make every dispute 'specialist' to that sector: insurers, construction companies and financial institutions (by way of example only) all routinely have commercial disputes with suppliers which have little to do with the industry sector in which they operate. It is unlikely that specialist sector knowledge is truly necessary for a mediator to assist meaningfully in such disputes.
- If the dispute genuinely does concern industry or sector specific matters, how much specialist knowledge or experience does the mediator truly need? Some believe it is critical that the mediator has a deep understanding of the precise nuances of the business sector that has generated the dispute, but the more stringent the requirements, the smaller the pool of mediators (if any exist) who will have the relevant expertise.
- It is suggested that in practice the mediator needs enough relevant industry or sector knowledge to 'speak the same language' as the parties and not distract them or disrupt the process by requiring explanations of basic terminology. In practice that may not need to be a huge amount of knowledge. After all, part of the mediator's role is to ask questions and test assumptions that the parties have made – and that process is of itself valuable to the parties. Tested another way, how much sector expertise would a judge or arbitrator have if they were resolving the dispute?
- It is often the case that a mediator's process skills – listening, questioning, negotiation-process management – will all be more important to the parties in finding a resolution.

Lawyer or non-lawyer?

- While a majority of mediators are legally qualified there is a material number of non-lawyer mediators who bring different skills and approaches to the mediation process.
- Most disputes that go to mediation arise against the background of legal relations, with a formal dispute through litigation or arbitration either in prospect or already underway. It is self-evident that it is comfortable for the parties (and their legal advisers of course) to engage with a lawyer who is already familiar with the terminology and process of formal legal dispute resolution.
- But bear in mind that many mediators (particularly facilitative mediators) are trained to avoid making assessments of the legal merits of the case in mediation. It is inherent in the process that the mediator has no decision-making power and many points that would fall for determination at trial or arbitration simply cannot be resolved in a mediation: the parties need to recognise that and factor it into their negotiation strategy. So pause to consider whether the mediator's legal training is really essential for the role they are to perform for the parties.
- Mediators who are not legally trained may have a wide range of other experience which is beneficial to the parties in finding a resolution. This can include industry or sector expertise (where this is truly required - see above), broader commercial perspectives or more highly developed interpersonal and communication skills. Of course, a non-legally qualified mediator requires sufficient familiarity with formal dispute resolution processes to engage credibly with the parties, but in practice that can be easily acquired without a formal legal training. As ever, the test is one of credibility – if the issues in dispute are likely to require the mediator to engage in debate over complex legal concepts, the lack of a legal training will be a disadvantage. But many disputes originate with little reference by the parties to their contractual or other legal relations and are often capable of being resolved by reference to economic, emotional and other underlying interests.

Mediator's style

- There are, of course, numerous variations in the style adopted by mediators. These are best viewed as a continuum, with pure facilitators at one end and evaluators at the other.
- A facilitative mediator assists parties to structure their negotiation and will be reluctant to express a view on the strength of a party's case or propose a possible settlement.
- An evaluator is likely to express his or her own views on both facts and law, to offer opportunities for the parties to set out their views on the merits and will be more inclined to make proposals for settlement. There is a risk that an evaluator may entrench one or both parties' positions by expressing views on certain issues and also risk alienating a party whose position is strongly maintained but inconsistent with the mediator's evaluation.
- Depending on the context of a particular mediation, many mediators will have the ability to use different styles at the request of the parties or to adapt to suit the negotiation as it progresses. But since most mediators will naturally favour a particular style by training or personality, it is worth understanding what will work best for you.

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Co-mediators and assistant mediators

- Where there are a number of parties or where the mediation is likely to be complex, consider whether there is merit in using more than one mediator to manage the process. Where two or (very rarely) more mediators play full roles in the process, they are referred to as co-mediators. This should be distinguished from assistant mediators, whose role is to assist the lead mediator (and who are usually mediators who have been trained but are gaining practical experience).
- This may be particularly relevant in technical disputes where there could be benefit in combining a mediator with subject matter expertise with a mediator who has particularly good facilitation and process management skills.
- Naturally, it is important that co-mediators should be able to work effectively together and that the parties should understand how roles and responsibilities are divided between a co-mediator team.
- While selecting more than one mediator increases costs, the additional fees are usually modest as compared with the legal costs of the parties in preparing for and attending the mediation and certainly as compared with the costs of litigation or arbitration.

THE MEDIATION AGREEMENT

With mediations having no statutory framework (at least in the United Kingdom), the mediation agreement is the contract between the parties that provides the procedural framework and rules for the mediation. Not only does the mediation agreement provide clarity for the parties but the mediator(s) will also require it, as it will set out their obligations and include terms to protect them.

It is common to sign the mediation agreement either just prior to, or at, the mediation. However, where the parties are engaging with the mediator significantly in advance of the mediation day(s) to ensure that the preparatory work is effective and sensibly structured, it would be good practice to sign the agreement earlier as soon as agreement as to the key terms is reached.

Mediation agreements are usually similar in form, irrespective of the dispute being mediated and whether the mediation is being conducted through a commercial mediation provider or on an ad hoc basis. Below are the most commonly occurring clauses and the key factors to consider when drafting or negotiating them.

Scope of the mediation

- The scope of the issues to be addressed in the mediation should be clearly set out in the body of the mediation agreement or in an appendix. To the extent possible, ensure that the description of the dispute is non-partisan and uses neutral language.
- If court or arbitration proceedings have already been commenced, it is common to refer to any claim number in the proceedings.
- If there are any additional issues or claims not currently raised in the commenced proceedings which you want to be resolved in the mediation, these should be expressly noted. Similarly, if any issues are to be carved out of the mediation, clearly identify these.

Parties and practicalities

- Identify the parties clearly and bear in mind who you wish to be bound by the rules and obligations of the mediation (for example confidentiality). Consider who you expect to be bound by any settlement, although it may not be necessary for every party to the ultimate settlement to be party to a mediation agreement.
- It is common to identify named representatives of the parties in the mediation agreement to act as lead negotiators and/or to be vested with authority to settle. If you specifically want a particular person from the other side to attend, try to have this included. In any event this is a good way to ensure that there will be parity of status and experience between the party representatives.
- Set out the date, time and place of the mediation that has been agreed; record any time limits. It is good practice to set out express provisions for the exchange of written case summaries (including their maximum length) and documents so that the parties and the mediator have sufficient time to prepare.

Authority to settle

- The most successful mediations are those where the parties' representatives in attendance have full authority to settle the dispute on the day (ie, without needing approval from anyone). You should aim to have strong drafting to this effect – for example: "Each party's representative(s) must have full authority to settle the dispute and bind the party to any settlement agreement at the mediation without reference to anybody else".

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- Try to avoid any proposal that the representative with authority to settle will be the party's solicitor, as invariably there will be restrictions on their authority and they may not have the flexibility to deal with issues that come up unexpectedly in the mediation.
- There will be situations where one party is unable to reach a binding settlement at the mediation, for example where a public body requires a settlement agreed in principle to be ratified through a formal decision after the event. It is critical to identify such situations in advance and make provision in the mediation agreement so that the mediation can proceed effectively with the parties understanding any limitations on what can be achieved.

Confidentiality and Without Prejudice

- You should ensure that the agreement contains an express agreement by all parties that the mediation is conducted on a 'without prejudice' basis and that they will keep confidential everything said in the mediation and every written document produced for the purposes of the mediation. While the confidentiality of the process will be implied under English law, even absent an express agreement, clear drafting is always preferable and will be insisted upon by any competent mediator.
- Consider carefully any proposal to make the very existence of the mediation confidential. In particular, consider whether there could be a legal requirement to disclose this in some circumstances – such as to a regulator and/or to the market. If the confidentiality provisions are to extend this far, it will usually be appropriate to include an express carve-out entitling the parties to make disclosure to the extent required by law.
- Include express language confirming that no party will seek to require the mediator to give evidence (nor produce his papers) in connection with the mediation in any current or future proceedings or satellite litigation unless each party and the mediator consent. (It is worth remembering that, where the parties have not consented, the English court still has a discretion to compel the mediator to give evidence or produce his papers where it is in the interest of justice to do so). The mediator will generally insist that he or she is indemnified by the relevant party for any costs incurred in resisting or responding to an application to be called as a witness or to produce papers.

Mediator liability

- It is standard for mediation agreements to include a provision to the effect that the mediator will not have any liability to the parties in connection with the mediation (usually subject to an exception for wilful misconduct or bad faith).

Settlement

- Mediation agreements commonly contain a provision to the effect that no settlement is agreed or legally binding until it is agreed in writing by way of settlement agreement. This provision reduces the likelihood of satellite litigation as to whether a settlement was reached and if so on what terms.

Costs

- In most mediations, the parties will split costs equally (including the mediator's fees and any venue costs), at least in terms of funding those costs to enable the mediation to proceed. In some circumstances, one party may be prepared to pay all the costs of the other party although this is typically confined to situations where a defendant company or institution wishes to incentivise an individual claimant (perhaps a litigant in person) to engage in the process.
- It is important to distinguish between the immediate payment of costs (how the mediator's fees are to be funded) and ultimate responsibility for such costs in the dispute. It may be that the parties agree that any costs paid in connection with the mediation will be borne by the parties as they are incurred but it is also possible to agree that costs for the mediation should be treated as being 'in the case' - meaning that if the dispute does not settle and proceeds to trial, the costs will be determined in those proceedings (probably along the usual rule that the loser pays the winner's costs). It is necessary to capture such a costs agreement in the mediation agreement.

Governing law and jurisdiction

- This is particularly important in cases where the parties are from different jurisdictions. England and Wales is a mediation-friendly jurisdiction and is the choice of governing law and jurisdiction (to the extent the court needs to become involved in supervising the conduct of the mediation or its consequences) for many of our clients. It should be noted that the laws of other jurisdictions may take different approaches, including as to confidentiality in particular.

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KEY CONTACTS



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



Alan Watts
Partner
T +44 20 7466 2076
alan.watts@hsf.com



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



Kristofer McGhee
Associate
T +44 20 7466 2588
kristofer.mcghee@hsf.com

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