What is mediation?

Mediation is essentially negotiation but with the added assistance of a neutral, independent third party mediator appointed jointly by the parties.

There are several different types of mediation. In a facilitative mediation the mediator doesn’t decide the case on its merits like a judge or arbitrator but tries to help the parties reach a negotiated agreement. In an evaluative mediation the mediator actually evaluates all or part of the case as part of the process. This evaluation isn’t binding on the parties but may help them to negotiate a settlement. Facilitative mediation is the most common form of mediation and that is what we focus on in this note.

Mediation is flexible and consensual and can be tailored to suit your needs. It is conducted in private and "without prejudice" and the outcome is non-binding unless and until agreement is reached.

If parties agree to use mediation they jointly select and appoint a mediator on agreed terms. They provide the mediator with background documents and information and fix a date and venue for the mediation.

On the appointed day the mediation usually opens with a joint session where each party briefly presents their case. The parties then break off into private meetings. Going from room to room, the mediator tries to clarify with each side privately where their real interests lie and where there might be room for compromise. The mediator then encourages the parties to design an acceptable settlement deal.

If the parties reach agreement they sign terms of agreement which they agree will be legally binding. If they cannot reach agreement they simply terminate the mediation.

Who pays?

Usually parties agree to share the mediator’s fees and expenses and other costs (such as venue, refreshments etc) but agree to bear their own legal costs. If litigation is already on foot, it may be possible to agree that, if the dispute doesn’t settle within the mediation then the court will be asked to assess all costs (including the legal costs of the mediation) and the loser will pay.

Ten advantages of mediation

1. Mediation may provide a quick and cheap way of resolving a dispute.

2. It can take place before litigation or arbitration or can run alongside either.
3. It is flexible and allows parties to reach their own creative solutions. In contrast, the adversarial process often entrenches positions and the remedies that judges and arbitrators can order are limited.

4. As it is conciliatory and the outcome consensual it helps to preserve good business relations.

5. The success rate is high – figures from the Centre for Effective Dispute Resolution suggest that 75% of cases settle on the day. 11% of cases settle shortly thereafter.

6. Mediation is confidential and protected by privilege.

7. The parties choose their mediator rather than having a judge imposed on them.

8. The process is voluntary and either party can withdraw or terminate at any time.

9. A skilled mediator can help parties work through deadlock and overcome communication problems.

10. Mediation can help narrow the issues and test the strengths and weaknesses of each party’s case.

**Disadvantages**

1. If the mediation fails then you will have incurred some extra costs and wasted some time. On the other hand you will have learned a great deal about both sides’ cases which may help you to narrow the issues.

2. The mediator can’t compel the other party to disclose documents.

3. If there are no proceedings already in train you may need to issue proceedings to enforce any settlement agreement.

4. Mediation won’t be appropriate if you want:
   - publicity; or
   - injunctive relief or some other order from the court such as a declaration of your rights; or
   - a precedent on a point of law which you can rely on in other cases. Mediation is a confidential process so has no precedent value.

**Do I need to mediate?**

The courts can’t compel you to mediate but are very keen to encourage mediation. They can impose financial sanctions if you have unreasonably refused to engage in mediation or some other form of alternative dispute resolution (ADR). This is because litigation should be seen as a last resort and the court rules require you to at least consider ADR before you issue proceedings.

If you do not consider ADR, unreasonably refuse to use ADR or fail to respond to an invitation to use ADR then the court could penalise you at the end of the case. For example, you could be ordered to pay the other side more in interest or costs or you could be deprived of interest and costs to which you would otherwise have been entitled.

In a recent case a party failed to honour an agreement to mediate by not turning up to the mediation. When it subsequently applied to the court for security for costs, the court refused to grant the relief sought as it regarded the failure to honour the agreement to mediate as “serious misconduct” of such gravity that it would not be “just” to make the order. This was despite the fact that the party had not breached any court order in failing to attend the mediation.

**When might it be reasonable to refuse to mediate?**
Refusing to mediate is a risky strategy. The court will assess whether your decision was reasonable. It will do this at the end of the case by which time it will be too late to change tack. Whilst case law can provide examples of what has or hasn’t been regarded as reasonable, all cases are decided on their own individual facts and it’s hard to predict in advance what a court’s view will be, particularly when there may be a mix of factors to take into account. The tenor of recent case law appears to be entirely against parties who failed to mediate.

Case law suggests that the court will take the following factors into account:

- the nature of the dispute and whether it was intrinsically unsuitable for mediation;
- the merits of the case and whether the party refusing to mediate reasonably believed that it had a strong case;
- whether other attempts to settle had been made but had fallen on deaf ears;
- whether the sums at stake in the litigation were comparatively small such as to make the costs of mediation disproportionately high;
- whether the proposal to mediate was made late in the day and could have delayed the trial;
- whether there was a reasonable prospect that the mediation would have succeeded; and
- the extent to which there has been judicial encouragement to engage in mediation.

Even if you think you have a strong case and think that the other side will demand concessions by way of settlement which you are not prepared to give, don’t write off the prospect of mediation altogether. The courts are increasingly keen to recognise the potential of mediation even when the parties appear a long way apart.

**When is the best time to mediate?**

Much will depend on the nature of your case. If your dispute is covered by a contractual dispute resolution clause which requires you to mediate at a certain point you may have no choice as to the timing.

Generally speaking though, the earlier you embark on mediation the greater your costs and time savings will be and the greater your chances of preserving cordial business relations. Note though that in some cases you may need further information or disclosure from the other side before you can properly assess the merits of your case, form a proper view on quantum or be in a position to evaluate settlement offers. In such cases it might be better to wait until all the relevant information and documents have been disclosed.

If enforcement is likely to be an issue, consider issuing proceedings first and embarking on mediation later. That way if the mediation is successful you will be able to record the terms in a settlement agreement which can be enforced within the proceedings. Issuing proceedings first will also be sensible if you think that you will need any interim orders from the court.

Mediating a dispute will not stop the clock running if there is a statutory or contractual time limit for bringing proceedings. If you need to, issue proceedings or enter into a standstill agreement; the mediation can run in tandem with the litigation or whilst the litigation is stayed but you need to preserve your right to bring a claim should the mediation fail.

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