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A Litigator's Guide to...

Mediation

Mediation is a form of alternative dispute resolution (ADR) that can be very effective if used in the right circumstances and at the right time.

In this guide, we'll give you some information about the process, and detail some of the key factors you need to consider for your client when considering mediation or including provision for mediation in contracts.

Pros & Cons

Mediation is a consensual, voluntary process, whereby an appointed mediator facilitates in negotiating a resolution to a dispute. It affords the parties a great deal of flexibility, allowing them to specify how it happens and to choose the mediator themselves.

Mediation works best when both parties are committed to trying to resolve the dispute. That isn't always the case at the outset of a dispute and so mediation often becomes a viable option only once a case has reached a certain stage and there are clearly drawn battle lines and legal issues.

It can be especially useful in commercial disputes where the parties want to preserve business relationships and not spend excessive time or money on litigation. Mediation potentially allows for a greater range of settlement options/remedies than are typically open to a Court and is quicker and more cost effective than litigation if successful.

However, mediation still comes at a cost, both in terms of time and money. A good proportion of commercial disputes can be resolved before court proceedings are issued and via more informal negotiations rather than a more structured process such as mediation.

Mediation is most useful in those cases which cannot be resolved quickly and often as a final step before court proceedings are issued or once that process is underway.

Practicalities

The mediator will be an independent third party, typically a trained lawyer. Depending on the nature of the dispute however, other industry specific professionals such as surveyors, engineers or accountants, can also be appointed.

Who pays for the mediator's fee is entirely at the discretion of the parties. Usually, it is split equally (particularly at the outset), but of course, any settlement can provide for one party to pay the other's legal costs including mediation fees.

The courts offer a small claims mediation service for claims under £10,000 and for higher value disputes, fixed fee mediation schemes are available.

Virtual mediations have become more commonplace since the pandemic. While mediating in person does certainly give an additional edge to negotiations, a remote

negotiation gives the option of saving time and money, particularly in smaller or less complex disputes.

The Mediation Process

Once a date for mediation has been set, the parties agree on a bundle of key documents to send to the mediator in advance. The parties may also exchange 'position statements' which briefly outline their position on the dispute and what they want to achieve from the mediation. Mediation is confidential meaning any documents or information exchanged in the process cannot be used as evidence in later proceedings or relied upon by the opposing party.

During the session the mediator will help the parties talk through the issues and assist in reaching a settlement. This takes place in a mix of group and private sessions. The mediator will not disclose anything said during private sessions to the other party without permission.

The mediator is not there to act as a judge and no decision can be imposed on the parties. If an agreement or settlement is reached at the end of the mediation, it is important to get it recorded in a written settlement agreement immediately and signed by the parties. Failure to do so can lead to settlements quickly unravelling.

If you don't get a settlement, that is rarely the end of the matter. Often, enough progress is made on the day to close the negotiating gap and discussions can continue in the days/weeks that follow (sometimes with the mediator still involved) to reach a resolution.

Contract Clauses

We often see mediation provisions in contractual dispute resolution clauses. As with any dispute resolution clauses, they should be appropriate to the specific relationship at hand. But as a general view, we would usually recommend against mandatory mediation provisions. Mediation tends to work best where both parties consent and they would of course be free to agree to mediate any point in a dispute, irrespective of a contractual obligation. Whereas 'forced' mediations can often create a barrier to an innocent party enforcing their rights or add a layer of cost & delay to a dispute that may well have been resolved anyway through a more informal negotiation process.

How Can We Help?

We can help your client decide whether mediation, or some other form of ADR, is the most effective form of dispute resolution taking into account the nature of the dispute, the amounts at stake, other settlement options and the merits of the case. Ultimately, this forms part of our general strategic approach to dispute resolution.

We are always happy to speak informally in the first instance and help where we can. If the case warrants a formal instruction, we offer a high level of service from our experienced team. Please get in touch if you would like to discuss.

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