

A QUICK GUIDE TO MEDIATION

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An introduction to Mediation

Mediation is a voluntary, confidential and without prejudice process applied to the resolution of disputes and differences. Indeed, mediation may be applied to stalled commercial negotiations and not just to disputes. Mediation offers many advantages over other ways to resolve differences; typically, it will be less expensive and quicker. The parties get to choose their “neutral”, that is the mediator. A high percentage, perhaps as high as 75%, of mediations settle on the day or shortly afterwards. The mediator is able to explore in private session with each party in a doubly confidential environment the needs, concerns and interests of that party and the parties are able to agree, if they so wish, outcomes, such as doing business on favourable terms in the future, which no Court or adjudicator could ever order.

So how do you get to mediation?

If you are already in a dispute which has become litigious, the Court may propose it and order a stay for mediation. Or you and the other party or parties can agree to go to mediation; or the contract that you are concerned with may contain a clause which requires any dispute to be referred to mediation before litigation or arbitration. Whichever way you come to mediation, you will then need to appoint a mediator and enter into the mediation agreement.

So, how do you find the right mediator?

You or your advisers may know of one already and of whom you have had favourable experience. The internet should prove a good source of leads. There are also various sets of mediation chambers and panels of mediators, such as In Place of Strife, Independent Mediators Limited, CEDR and ADR Chambers. The panels generally charge a mark-up, so enquire carefully about fees and compare those that charge a basic fee with the potential for lots of extras with those that charge what might appear to be a higher fee up front, as this may include more.

What you should you look for in a mediator?

Probably somebody who will understand your business and your sector. A lawyer may be more suitable if the case is a complex one legally. On the other hand, if emotion is the main event, someone more charismatic or touchy-feely may be better. Do not hesitate to ensure that your mediator has the capacity to take on your job and also do not be afraid to talk to the mediator about their approach before selecting them. So far as is possible, make sure that the mediator has the energy to cope with what may be a very long day. When it comes to cost, the first thing to say is that the cost of the mediator are generally (but not always) shared between the parties. The cost of a mediator for a small case could be £1,500 for half a day and range up to £3,500 to £5,000 for a really big case, all plus VAT. The mediator or mediation institution will normally insist on being paid in advance. The venue is up to you and the other party or parties. You will generally need three rooms, one for each party and one for the mediator. Law firms' offices are good and they will normally not charge if one of their own clients is involved. Otherwise, institutions such as the Chartered Institute of Arbitrators and the IDRC in London hire out rooms, the cost being around £500 plus VAT for the day.

On the day, the mediator will usually hold an opening joint session and invite each party to make a short opening statement, focusing on the respective needs and interests of the parties. This is also a good opportunity to get out on the table any burning emotions in what should be a safe environment.

Continued on next page >

If you have a strong legal case, this may also be a good opportunity to convince the other side (and the mediator). Whilst the mediator may hold everyone together in the joint session for a while, he is more likely to break into private session with each party, in order to start defining the issues that need to be tackled and the possible solutions.

The parties will also need to engage and make and respond to offers and counter-offers, as otherwise the process will bog down and become circular. Deadlock will be encountered and sometimes appear intractable; the mediator should have a range of techniques for dealing with such deadlock or “ hitting the wall “ as it is sometimes called. These may include putting different groups together or perhaps putting the lawyers together without their clients.

Having made it through deadlock or “ hitting the wall “, you reach an agreement in principle, which will then need to be reflected in a written, binding agreement. This will need to be drafted, perhaps by the lawyers; you can ask the mediator to assist- some will be more willing than others. You will then sign up and, if the matter has gone to Court, one of the lawyers will need to lodge the draft Court Order. The settlement agreement will generally be stated to be confidential but the parties may wish to put out an agreed statement and this will be provided for in the agreement

What happens if you refuse to mediate?

Mediation is not compulsory but you may face Court sanctions on costs if you unreasonably refuse to mediate, even if you win your case at trial and would normally expect to recover the bulk of your legal costs. How does it feel? Mediation is not a soft option; to be successful, it has to be like yoga, involving flexibility, stretch and perhaps some short term pain. Overall, at worst a practical way of disposing of an inconvenient dispute; at best, a cathartic experience which genuinely enable the parties to move on.

Further reading:

What is set out in this Free Guide to Mediation applies mostly to so-called Civil and Commercial Mediation, that is the mediation of civil and commercial matters and disputes. Family Mediation is another branch and there is more on both Civil and Commercial Mediation and Family Mediation on the Michael Cover ADR website at www.michaelcover.com . A good reference point would be the Family Mediation Council at www.familymediationcouncil.org.uk . Its counterpart in Civil and Commercial Mediation and increasingly Employment and also Community Mediation is the Civil Mediation Council at www.civilmediation.org .

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About Michael

Michael is the Principal of Michael Cover ADR Limited. He has over 30 years experience as a Barrister, and Solicitor, both in private practice and as in-house Counsel. He is an accredited Mediator with CEDR, ADR Chambers and ADR Group and has been involved in over 100 mediations. He is a full member of In Place of Strife, the Mediation Chambers.

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