Briefing Note on Mediation

What is Mediation?

Mediation is a private and confidential dispute resolution process in which a neutral third party, the Mediator, seeks to help the parties to reach a mutually acceptable settlement. The process usually involves some level of briefing of the mediator pre hearing and an actual mediation hearing, which typically lasts a day. The hearing is attended by a 'decision maker' for each party as well as their legal advisors, relevant experts and insurers (if any). The process is voluntary (parties can withdraw at any time) and non-binding unless a settlement is reached.

What is the Role of the Mediator?

The Mediator is a facilitator appointed by the parties. At the mediation negotiations take place directly between the parties themselves, assisted by their advisors. The Mediator's function is to support the process, gather information and assist in problem-solving. The Mediator will try to isolate the issues, help to evaluate the strengths and weaknesses of each party's case and encourage the parties to work co-operatively towards settlement. Parties often select a mediator who is a specialist in the particular area of the dispute.

What are the advantages of mediation?

Costs - Mediation provides an alternative to the route of costly litigation. The expenses include the Mediator's fee, the cost of preparatory work undertaken and overheads for the day. The Mediator's fee and overheads are usually shared between the parties. Each party bears its own costs and expenses. In Commercial Court cases and in personal injury cases respectively, mediation may be suggested or imposed by a Court during the course of proceedings and refusal to participate or do so in good faith may have negative cost consequences.

Control - 'Ownership' of the dispute and the outcome remains with the parties. They are actively involved throughout. They can reveal what they want whenever they want to. They can arrive at their own solution in their own way rather than have one imposed on them by the court.

Confidentiality - The process is confidential and without prejudice to any proceedings. Information and documentation shared privately with the Mediator cannot be passed to the other party during the mediation without express permission. Furthermore, the outcome of the mediation is only publicised if the parties so agree.

Flexibility & Commerciality - Mediation concentrates on commercially based settlements and focuses party's minds on the realistic resolution of problems. Parties are encouraged to make non-binding concessions and to propose their own formulae for resolving the dispute. Mediation provides parties with an opportunity to negotiate a tailored solution that will suit their mutual needs. It is a particularly valuable process where there is an ongoing commercial relationship, which parties wish to preserve.

How much preparation is involved?

Preparation is the key to successful mediation and the intensity of preparation will usually be no less than that which is put in immediately before a trial. For both parties a risk analysis is crucial and the best and worst case outcomes ought to be identified in advance of the mediation. If a settlement is not reached, this preparation is not wasted, as it will be needed for trial or further settlement negotiations.

The Mediation Process

Mediation involves five phases, one in advance of the mediation hearing and the others on the day of the mediation.

The Preparation Phase - This involves selection of the mediator and agreeing the terms of the mediation, which are set out in a mediation agreement (typically 3 or 4 pages long). The terms will include time and venue for the mediation, details of the Mediator's fees, the nature of information or documentation (such as short case summaries) to be exchanged in advance

of the mediation, the role of the mediator as facilitator rather than decision maker and that the process is confidential and without prejudice to any proceedings.

The Opening Phase - The parties meet in joint of plenary session; an introduction is given by the Mediator and the parties make a short opening statement to each other setting out their position and objectives.

The Exploration Phase - Private or caucus meetings take place between each party and the Mediator, at which the Mediator will seek to explore the nature of each party's case, their aims and objectives and engage in 'shuttle diplomacy'. The ground is prepared for settlement negotiations between the parties by clarification of their respective issues and agendas.

The Negotiation Phase - Direct and indirect negotiations begin with the assistance of the Mediator who challenges each side to explore the strengths and weaknesses of their position and what their best and worst alternatives are to a negotiated agreement (BATNA and WATNA); working groups (for example between experts) may be established as parties discuss the issues in an attempt to break the deadlock.

The Concluding Phase - Lawyers representing both sides draw up the agreement recording the settlement.

What if Mediation fails?

If settlement is not reached in mediation it is often reached shortly afterwards. At worst mediation can achieve a streamlining of the issues in any subsequent litigation. Nothing is lost by exploring mediation. The cost of preparing for the process stands to each party's benefit in any subsequent litigation and as the process is confidential and without prejudice, concessions made cannot be relied upon or referred to in the litigation.