

Article: Mediation in England - Part 1

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What is Alternative Dispute Resolution?

The term Alternative Dispute Resolution (ADR) is defined in the Glossary of the Civil Procedure Rules (CPR) as a “collective description of methods of resolving disputes otherwise than through the normal trial process”. References to ADR are usually understood as being references to some form of mediation by a third party.

What is Mediation?

Mediation is a form of Alternative Dispute Resolution. It is a structured negotiation where a neutral third party (the mediator) acts as a conduit to assist the parties to reach a settlement. It is a consensual process which depends on the willingness of the parties to enter and continue negotiations. The introduction of a neutral third party is one feature that distinguishes mediation from simple negotiation. The parties are themselves responsible for reaching an agreement since there is no judge or arbitrator to decide issues for the parties, and no decision is imposed on them by the mediator. Once a settlement agreement has been reached according to the laws governing the parties or the mediation, then the process culminates in a binding resolution. The use of mediation is not confined to disputes between two parties only.

One of the reasons for the prevalence of mediation today is that it manages to overcome many of the barriers encountered in reaching a settlement. These include a failure of communication, bad negotiation skills, a lack of information, emotionalism, a disagreement, even in good faith, about the legal outcome, and possibly even the wrong parties being involved in the negotiations.

How does Mediation work in practice?

The mediation process starts when the parties agree to negotiate towards a settlement and to appoint a mediator to assist in those negotiations, or by a Court Order recommending mediation.

The next step is a contract to mediate signed by the parties and the mediator. This appoints the “neutral” or mediator (including reference to his fees and the costs of the mediation process) as well as detailing the obligations of the mediator and all the parties during the process. It is vital to have a very clear agreement with the parties as to the nature of the mediation and the way it is to be conducted. The limits of the mediator’s authority must be clearly defined. Does the mediator, for example, have authority to disclose to one party documents given to him by the other? What information given to the mediator must remain confidential? How are the costs of the mediation to be funded?

Normally the parties agree to negotiate in “good faith” towards settlement and that every step and every event connected with the mediation process is entirely “without prejudice” to any pending or future court proceedings. As all parties will want to be able to speak their minds and have total freedom to negotiate without having to worry about the use to which the statements or documents could be put.

Then follows a meeting between all parties and the mediator in which the mediator explains the process and then invites the parties to explain their position in turn. This explanation often involves lawyers on each side summarising their views on the issues, both legal and practical, orally and/or in writing. This element of the mediation is best described as an “information exchange” designed to identify the limits of the dispute and engage the parties in the negotiations.

At some point in the process, the mediator may suggest that the parties separate so that he can discuss the issues privately with each party. The rest of the process involves negotiations between the two parties interspersed with private meetings with the mediator until agreement is or is not achieved.

The mediator may do all or some of the following during mediation:

- Seek to control the negotiations to avoid their breakdown.
- Provide means of communication that the parties would not entertain in direct discussions across the table.
- Question and probe both parties as a means of assisting them to focus on the material issues and understand the strengths and weaknesses of their respective positions.
- Evaluate the dispute and provide opinions as a means of driving the negotiations.
- Report and make suggestions at the end of the mediation session.

The Stages of Mediation

In summary, mediation can be divided into a number of stages, although clearly these can differ according to the demands of the different kinds of dispute and the requirements of a particular dispute. The stages can generally be defined as:

- The initial enquiry;
- A contract to mediate;
- Preliminary communications and preparation;
- Meeting of the parties;
- The parties' presentations of their standpoint;
- Facilitating negotiations;
- Strategies for dealing with impasse (deadlock);
- Terminating mediation and recording agreements;
- Post termination phase.

Turning to the styles of mediation, a distinction of often made between facilitative and evaluative mediation. Broadly, facilitative mediation means interest based negotiation in which the mediator helps the parties to explore options and enhance the mutual interest. On the other hand, evaluative mediation tends to be more rights based, where the mediator makes or obtains an assessment and expresses his view on the merits of the dispute. Many mediators are reluctant to undertake the evaluative role.

How does mediation in the UK differ from conciliation in the UK?

Conciliation, involves as mediator a neutral third party who assists the parties to negotiate the settlement of their differences in a structured fashion. In this scenario, the conciliator will play a more active role by informing the parties of his opinion on the issues as necessary. Thus, the distinction between a mediator and a conciliator is that the latter will inform the parties of his decision on the issues discussed during the joint meeting in the hope they will be guided by that decision to reach an overall settlement. However, the conciliator's decision is not binding on the parties and they are both free to ignore it. Generally, conciliators will not make their views known until towards the end of the process in the hope that the parties will reach a settlement agreement without such further information.

Why Mediation?

Mediation can often be an effective way of resolving a dispute.

Recognition: In hearing and being heard in a mediation forum, parties gain the understanding of the other party's point of view and an enhanced opportunity to be heard and understood themselves.

Empowerment: Parties are empowered to decide for themselves whether and how they would like to resolve a situation.

Speed: In resolving or narrowing disputes in mediation, parties avoid delay. Most mediations take one or two days, rather than weeks, months or even years, as with most court litigation or arbitration. An ADR agreement might set an overall time limit for the entire process of 30 or 60 days, which in most cases will be reasonable. The average duration is between 4 and 6 weeks, so a typical timetable might be as follows:

- Weeks 1-2: Agree on ADR and approach neutrals or appointing body (such as CEDR).
- Weeks 3-4: Brief neutral, arrange a venue and exchange information in preparation for ADR session.
- Weeks 5-6: First ADR session lasting one day (process may continue if matter not settled).

(A complicated or large case may require a longer period to prepare for the first ADR session, and a session may extend over several days).

Informality and flexibility: A court or arbitrator is constrained, both in terms of the procedure to be followed and in the range of remedies which are available. In most cases an award of money will be the only remedy on offer to the parties, whereas ADR, for example mediation, can offer a range of processes and settlement options. It is one of the advantages of ADR that the experienced practitioner can devise special procedures, unfettered by formal rules of arbitration or of litigation. At the end of an ADR process the parties may agree, for example:

- That one party will publicly apologise to the other and provide an explanation;
- that they will co-operate in future ventures, the profits of which will be shared;
- to exchange technologies or licence agreements;
- to amend ongoing contracts;
- to the payment of funds over time, perhaps linked to stock market or foreign currency movements;
- that one party will refrain from or do a specific act (equivalent to an injunction or specific performance).

Indeed, the settlement possibilities are constrained only by the imaginations of those involved in the ADR process, and the laws generally governing any settlement agreement into which the parties may wish to enter.

Cost: In evolving or narrowing areas of dispute through mediation, parties save an enormous amount of time, energy and expense associated with protracted conflict. The main cost of ADR, for example mediation, are the fees incurred with the administration of the process (if any), the mediator employed by the parties, the venue, and the time spent in preparation for the ADR sessions by the parties and their professional advisers. In contrast to the expenses that can be incurred in the process of disclosure and preparation for a formal court hearing it is easy to see why ADR is more cost effective.

Relationships: Litigation is not designed to create harmony - it is the last thing that it achieves! At least one of the parties will emerge from the adversarial atmosphere as the "loser", and in some cases where the costs outweigh the sums in dispute, even the winner might show little or no

'profit' from the process. ADR processes generally avoid such damage with the result that the majority of ADR users expect to increase their use of ADR in order to resolve their disputes. The parties in ADR are encouraged to create a mutual gain, which is then distributed to compensate for past losses. Such an exercise is more likely to enhance relationships in the future than a judgment or award, which necessarily rests on historical facts rather than the future. Costs tend to be controlled by the parties to the extent that they do not become committed to spending more than they had planned at the outset, as can happen in litigation. Future commercial relationships can be maintained or any rifts healed much more easily in the informal atmosphere of mediation as opposed to the adversarial nature of a long and possibly drawn out bout of litigation.

Clarity: Parties are forced (both in preparation for and during the mediation) to focus on and assess the relative merits of their claims at an early stage, which is not always the case in litigation. In doing so, the parties' decision makers, who will ideally be senior executives, will be able to weigh up much earlier than they might in litigation the pros and cons of their case; a settlement resulting from an informed recognition that their case may not be as strong as they had thought, is less likely to engender hostility and bitterness that can arise when parties are forced to compromise after years of litigation.

Confidentiality: While litigated cases are a matter of public record what transpires at a mediation can be kept confidential by agreement.

Quality of settlement: Studies indicate parties entering into voluntary arrangements through mediation are perhaps more likely to adhere to and fulfil commitments made in such agreements than they are with judicially imposed resolutions.

Reality check opportunity: In a private caucus (meeting of a party with its own advisers behind closed doors) mediation can afford the opportunity to communicate important "reality check" information that may be easier for a client to accept from a neutral individual such as a mediator.

What happens if a settlement is not reached?

While there is the possibility that mediation may not result in settlement between the parties, at the very least the parties should leave the process better informed as to the strengths and weaknesses of the respective cases, and that most of the preparation work is both valuable and re-usable in any future litigation.

Does mediation suit every case?

It should be noted that The Court of Appeal has held that ADR is not a panacea. It is not generally suitable for disputes between a citizen and the State where civil liberties are involved, fraud, where a point of law requires a judicial decision and thus binding precedent (for example where an insurance company with many policy holders may wish to establish the meaning of a standard and widely used policy clause) or where injunctive or other relief is required to protect a party (for example by successfully enforcing rights against one or competitors in the market that could then be enforced internationally). However, even in these cases, once the decision in principle is given, ADR can be used to resolve disputes as to quantum. Even in the case of a time bar to litigation approaching, it is perfectly possible to commence, and if necessary serve notice of, litigation within time and then agree a stay while mediation is undertaken.

In Part Two of this paper we will look closely at the Courts' attitude towards mediation as reflected in recent case law and how, whilst stopping short of compulsion, the Courts are prepared to use costs penalties to encourage the parties to undergo mediation.

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