

MEDIATION GUIDELINES

WHAT IS MEDIATION AND HOW DOES IT WORK?

Introduction

This is a short guidance note to help parties preparing for and attending the mediation of their dispute.

What is mediation?

Mediation is a form of confidential negotiation conducted by the parties and their advisors with the guidance and assistance of an independent mediator. The mediator helps the parties focus on why settlement should be considered and how it can be achieved. The mediator does not decide who is right or wrong or impose a decision to that effect. If the dispute is capable of settlement, it is for the parties to decide if and how it settles.

The mediation agreement

A draft mediation agreement will be circulated by the mediator in advance of the proposed mediation day. The mediation agreement regulates matters between the parties, their advisors and the mediator. The core terms of the mediation agreement are (1) the confidentiality of the mediation, (2) that there is no binding settlement unless it is put in writing and signed, and (3) the costs of the mediator.

Pre-mediation contact

The mediator will endeavour to contact the parties/their lawyers and introduce himself/herself before the mediation and discuss any issues in advance of the mediation. Those discussions will be undertaken on a confidential basis as part of the mediation.

Preparing for a mediation

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The following points comprise some matters to consider prior to the mediation:

- Attend with authority to settle
- Aside from your legal advisers, consider who should attend the mediation with you. Will additional members “add value” to your team?
- In advance of the mediation you should have given great thought to your case and its legal merits. In addition, explore the commercial aspects of your case
- Think about the possible solutions
- Calculate your legal costs to date and the estimated legal costs to trial
- Prepare and deliver your position statement and mediation bundle to the mediator in good time for them to read/consider it prior to the mediation
- The mediation bundle should be limited to what you consider is important and for the mediator to read in preparation for the mediation
- Consider including in your position statement the following: (1) the names of the attendees, (2) a brief summary of the case and its value/the issues, and (3) the offers exchanged to date
- The mediation usually lasts one day

The mediation day

The parties will have chosen the venue for the mediation. The mediator will meet privately with each party and their advisers prior to a possible joint meeting between all parties (this is not obligatory). If you have not already done so, you will be asked to sign the mediation agreement (referred to above). The majority of the discussions over the course of the mediation day are private sessions between the mediator and the individual parties and their advisers. As the mediation day develops there may be discussions between advisers chaired by the mediator. The key attraction of mediation is its procedural flexibility.

Confidentiality

The mediation is conducted under the umbrella of confidentiality. The terms of confidentiality are contained within the mediation agreement. Confidentiality works on two levels:

- (1) The private discussions between the mediator, each party and their advisers are confidential and must not be passed onto the other party and their advisers without express permission; and
- (2) The mediator, the parties and their advisers undertake the entire mediation on a confidential basis. The appropriate use of confidentiality creates the private time and space needed for the mediation to work.

Settlement

For the settlement to be binding, the terms must be in writing and be signed by the parties. Whenever possible, the drafting and signing of the terms of settlement will be undertaken on the mediation day.

Those mediations which do not settle on the day often finish with a “window for settlement” which allows for further contact from the mediator to close a settlement.

Conclusion

Mediation, especially mediation day, takes time and is hard work for all parties attending however it can be very rewarding.