

## Don't Hesitate - Mediate

If you have been involved in litigation you will know to your cost how expensive it can be, not just in legal fees and Court fees, but also in terms of management time. It was because of the expenses of litigation that during the 1960's commercial organisations in the United States looked at other ways of resolving disputes without resorting to Courts. These Alternative Dispute Resolution methods are now known as "ADR". There are several forms of ADR techniques including executive tribunal (or mini tribunal), expert appraisal and fast track adjudication, but the one which has met with the greatest success has been mediation.

Mediation is a voluntary, non-binding private dispute resolution process in which a neutral person helps the parties to reach a negotiated settlement. It is unlike arbitration in that it is:

- non-binding between the parties
- voluntary
- conducted by a mediator or "neutral"
- informal
- unhampered by the rules of evidence
- conducted in private
- conducted entirely on a without prejudice basis.

The result is either no agreement between the parties or, in the majority of cases, an agreement acceptable to both parties to the dispute. Management time is not wasted and the costs are kept to a minimum.

The mediator or "neutral" is just that; someone who is unconnected with the parties and impartial. He or she does not make a decision on the outcome of the dispute, but merely suggests between the parties how the dispute might be resolved to their mutual benefit.

Mediation has several advantages:

- it is quicker than litigation
- it is cheaper than litigation
- it enables the parties to continue with any business relationship that they enjoyed before the dispute arose and
- it is confidential

Mediation is by no means suitable in all cases. It is certainly not suitable where one party wishes to apply for a Protective Court Order, such as an Injunction, but there is no reason why parties locked into a dispute should not agree to mediate while reserving the right either to commence legal proceedings, or to continue legal proceedings while the mediation is under way.

One criticism often levelled at mediation is that it cannot work because it does not provide an enforcement mechanism. That is not true. There is a substantial body of evidence to suggest that, of cases referred to mediation, in excess of 80% of them have been successfully resolved. Where the parties have reached an agreement that they believe can resolve the dispute between them, the terms of it are reduced to writing by the mediator to form a legally binding contract. If one of

the parties subsequently breaches the terms of settlement, then the other party is free to enforce the contract through the Courts.

The process is informal. Where the parties have agreed to mediation and have selected a mediator, he or she may invite them to a brief meeting and explain how the system works.

A date will be agreed for the mediation process and normally all but the most complex disputes can be resolved during the course of one day. The mediator will ask the parties to prepare a short and written brief note of their dispute. A date for the mediation would be arranged when the parties (accompanied by their lawyers) will attend before the mediator. The mediator will then invite the parties to make a short address to him. He will then invite the parties separately to discuss the dispute in caucus. This procedure can take several hours, but it is during this process that the mediator will separately discuss the parties' positions, the claim and any counterclaim and seek to bring the parties together. The mediator will respect the parties' confidentiality and only disclose weaknesses in one party's case to the other with express consent.

It is no part of the mediator's role to decide on the means of resolving the dispute and to impose it on the parties; he or she acts solely as a facilitator and problem solver. If the parties are not able to find any common ground and resolve their differences, then they are quite free to withdraw from the mediation at any time and resort to litigation. But where an agreement is reached, the parties' legal representatives will be invited to prepare a short agreement detailing the settlement, which can at a later date be enforced if it should prove necessary.

Mediation is effective in all sorts of disputes, particularly commercial and business disputes where it might be important for the parties to resolve their differences in such a way as to permit a continued business relationship.

Costs vary, depending upon the level of claims, but nonetheless is likely to prove less expensive than litigation, particularly when one considers that the costs of preparing for trial, let alone the trial itself, can run into thousands of pounds. Indeed, as anyone who has resorted to law will know, even a successful party who is awarded costs, will not recover 100% of his or her expenses.

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