

## Don't Hesitate - Mediate

### What is Mediation?

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 methods of resolving disputes. These Alternative Dispute Resolution methods are now known as "ADR". There are several forms of ADR available including executive tribunal (or mini tribunal), expert appraisal and fast track adjudication, but the one which was met with the greatest success has been mediation.

### What is Mediation for?

Mediation is a voluntary, non-binding private dispute resolution process in which a neutral person helps the parties to reach a negotiated settlement. The process has many advantages in that it is:

- non-binding between the parties
- voluntary
- conducted by a Mediator or "neutral" party
- informal
- unhampered by the rules of evidence
- conducted in private
- conducted entirely on a without prejudice basis
- more flexible than court process

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 facts of the dispute, but concentrates on persuading the parties to reach a settlement to their mutual benefit.

### Why Mediation?

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 cannot 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. This is not the case. 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

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

### How does Mediation work?

The process is informal. Where the parties have agreed to mediation and have selected a Mediator, the mediation process begins.

A date will be agreed for the mediation 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 written note of their position. The parties (usually accompanied by their lawyers) will attend before the Mediator. Usually there will be a joint meeting for all to attend where the Mediator will invite the parties to make a short address. He will then invite the parties separately to discuss the dispute with him. 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 can only disclose aspects of 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 to resolve their differences, then they are quite free to withdraw from the mediation at any time and resort to litigation. However, 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 continuing business relationship.

Costs vary, depending upon the complexity of claims, but nonetheless mediation is likely to prove less expensive than litigation, particularly if used at an early stage of the dispute.

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