

BATES WELLS & BRAITHWAITE'S GUIDE TO MEDIATION



About this guide

This guide seeks to provide an overview of the mediation process and answer some of the questions most frequently asked by clients involved in mediations.

What is mediation?

In the context of a legal dispute, mediation is a voluntary non-binding private dispute resolution process in which a neutral person (the mediator) helps the parties to try to reach a negotiated settlement of a dispute. Unlike Court proceedings, mediation is more diplomatic than judgmental – at a mediation a dispute will only be resolved if the parties can agree terms.

How does mediation work?

Typically, mediation will take place at a neutral venue over the course of a day. A mediation will often begin with the parties and their representatives meeting and briefly setting out their respective positions. After some discussion the parties will usually retire to separate rooms where they can discuss matters and reflect on what has been said.

A trained mediator will usually be present throughout the mediation and will often shuttle between the parties with suggestions or comments with the aim of enabling the parties to reach some

common ground. The parties are likely to have further face to face discussions as the day progresses.

If the parties can agree the terms of a settlement, a formal and binding agreement will be drafted and signed, ideally on the day.

Who is the mediator and what is his role?

The parties will usually agree who should be the mediator. Mediators undergo special training and there are a number of mediation service providers offering a large choice of mediators with wide ranging backgrounds and experience. There is a good chance of finding a mediator who will understand the issues and dynamics of the case.

A mediator's role is to facilitate negotiations and to assist the parties to resolve their differences. Mediators, who are not there as judges, cannot impose a decision on the parties. They are not supposed to express a view as to which party they think is in the right, although they often do, albeit subtly.

Why should I mediate?

Whether or not a party to a dispute feels they have a strong case, there are many reasons why they should consider mediation, including:-

- **Mediation works**

The majority of mediated disputes settle on the day or shortly thereafter.

- **Mediation is flexible and informal**

The ways in which a Court can settle a dispute are limited. Mediation allows the parties to resolve disputes in a variety of inventive ways that a Court does not have the power to impose. These can include, for example, agreeing wording for press releases, letters of apology, and even an agreement to work together in the future.

- **You will be at risk on costs if you unreasonably refuse to mediate**

The Court expects and requires litigants to consider alternative dispute resolution options such as mediation. A party who unreasonably refuses to mediate a dispute can be ordered to pay their opponent's legal costs even if their claim is successful at trial. This can be an important factor in persuading an opponent to mediate whose position has become entrenched .

- **Mediation can be arranged quickly and can save costs**

Mediation can be arranged at short notice and is significantly cheaper than litigating a dispute to an end. Costs vary from case to case but are minor in comparison to the costs of litigating a dispute to trial, which can run to tens or even hundreds of thousands of pounds.

- **Mediation is conducted in private and is confidential and 'without prejudice'**

The entire mediation process is usually private and confidential. In addition, because it forms part of a genuine attempt to settle a dispute, everything that is discussed is on a 'without prejudice' basis. This means the details of the discussions cannot be adduced as evidence before the Court except in certain circumstances, and so parties to mediation can be open and express their views in a frank and forthright manner. This will often help identify what the real issues are and what is driving the dispute, whilst affording some comfort that what is said is 'off the record'. For more information about without prejudice communications, please see our *Guide to The Without Prejudice Rule and Part 36 offers*.

- **Mediation allows both sides to save face**

Since it is up to the parties to reach agreement, there is no outright winner or loser as there is in court proceedings. This means that both parties

can leave the process with a settlement they can live with and are more likely to continue or resume a commercial relationship.

- **What type of disputes are suitable for mediation?**

It is generally felt that there are very few disputes that are not suitable for mediation.

- **When is the best time to mediate?**

Mediation is often carried out during the course of litigation or other dispute resolution processes such as arbitration. Proceedings can be suspended while the mediation takes place.

About us

Members of our Dispute Resolution Group are experienced at mediating disputes and two of our partners are accredited CEDR (Centre for Dispute Resolution) mediators.

If you have any questions about this guide or any other matters please do not hesitate to contact one of the following members of our Dispute Resolution Group at disputeresolution@bwbllp.com or

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